No. 00-9280

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM ARTHUR KELLY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX
Volume II, Pages 156-345

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[1823] **DR. JOEL S. SEXTON – DIRECT BY MR. MYERS**

* * *

DR. JOEL S. SEXTON,

BEING ALREADY BEING DULY SWORN, RETURNED TO THE WITNESS STAND, AND TESTIFIED AS FOLLOWS:

THE COURT: LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH, DR. SEXTON.

THE WITNESS: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. MYERS:

Q DR. SEXTON, I WANT TO HAND YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT NUMBER 108, STATE EXHIBIT NUMBER 109.

A (WITNESS COMPLIES.)

Q YOU ARE LOOKING AT SOME SLIDES YOU TOOK AT THE AUTOPSY?

A THAT'S CORRECT. AND THESE ARE PHOTOGRAPHS THAT ARE CONSISTENT WITH THE SLIDES THAT I TOOK AT THE TIME OF THE AUTOPSY.

Q AND NUMBER 108, IS THAT SUBSTANTIALLY THE CONDITION THAT THE BODY WAS IN WHEN IT ARRIVED IN NEWBERRY AT YOUR OFFICE?

A YES, THAT'S CORRECT.

Q AND THEN 109, WOULD BE TURNING THE BODY OVER?

A YES, THAT'S CORRECT.

Q WHAT IS THAT ON THE STOMACH OF MS. SHEALY?

A THERE ARE TWO THINGS NOTED ON THE FRONT. ONE IS OUR [1824] LABEL WHICH HAS A NUMBER ON IT AND IT'S A RULER. THE OTHER ARE BLOODY DOLLAR BILLS THAT ARE ON THE FRONT OF THE PERSON. THEY ARE STUCK TO THE FRONT OF THE CLOTHING.

Q AND WAS THAT, I THINK, TESTIMONY BEING THE 102 DOLLARS THAT WAS REMOVED THAT WAS STUCK TO THE FRONT OF HER?

A YES, SIR, THAT'S CORRECT.

Q OKAY. NOW, WITH RESPECT TO THE CLOTHING, DOCTOR, DID Y'ALL REMOVE THE CLOTHING THERE, TOO?

A YES, WE DID.

Q WAS IT APPARENT THROUGH THE CLOTHING THAT THERE WERE CERTAIN STAB MARKS ON THE OUTSIDE?

A BEFORE WE REMOVED THE CLOTHING, WE EXAMINED THE BODY EXTERNALLY WITH THE CLOTHING IN PLACE AND THERE WERE APPARENT STAB HOLES THROUGH THE CLOTHING. PARTICULARLY, IN THE UPPER BACK OF THE CLOTHING

AND IN THE BACK OF THE PANTS THAT CORRESPONDED TO STAB HOLES IN THE BACK OF THE BODY.

THE OUTER GARMENT, THE JACKET, ONLY HAD A FEW STAB HOLES IN IT. IT DIDN'T HAVE – OBVIOUSLY, IT WAS NOT IN THE SAME LOCATION ON THE BACK OF THE BODY AT THE TIME THE MULTIPLE STAB WOUNDS WERE INFLICTED IN THE UPPER BACK.

Q REFERRING TO THE JACKET, CAN YOU POINT OUT ON THERE SOME OF THE STAB WOUNDS?

A MAY I STEP DOWN?

Q YES, SIR.

[1825] A (WITNESS COMPLIES.) THIS IS THE OUTER GARMENT THAT SHE WAS WEARING AND THERE'S A STAB WOUND HERE OR A STAB HOLE HERE AND HERE IN THE LEFT ARM AND THAT CORRESPONDED TO A HOLE IN THE BACK OF THE LEFT ARM.

HERE ON THE UPPER LEFT BACK IS A SINGLE LONG STAB HOLE THAT CORRESPONDED TO ONE OF THE STAB HOLES IN HER UPPER BACK. THERE WERE OTHER STAB HOLES IN THE BACK, BUT THIS IS THE ONLY ONE THAT WAS FOUND ON THE JACKET.

HERE ON THE LOWER LEFT OF THE JACKET IS A SINGLE STAB HOLE PLUS A V-SHAPED HOLE. THE JACKET WAS – AT THE TIME THAT WOUND WAS INFLICTED WAS FOLDED SO THAT THE WOUND WHEN IT WAS INFLICTED AS IT WENT THROUGH THE CLOTH, IT ALSO HIT A FOLD IN THE CLOTH

AND CAUSED THAT V-SHAPED HOLE THAT YOU SEE BESIDE THE ELONGATED HOLE. AND THIS ONE DID CORRESPOND TO A HOLE IN THE LOWER BACK. THOSE WERE THE ONLY STAB HOLES IN THE JACKET.

Q HANDING YOU THE SHIRT SHE WAS WEARING UNDER THE JACKET.

A THE SHIRT HAD MULTIPLE STAB HOLES SOME OF WHICH WERE, AS YOU SEE, QUITE LARGE INDICATING THAT THE KNIFE WENT IN AND THEN WAS DRAWN OUT IN A FASHION SUCH THAT THE SHARP EDGE CUT AN ADDITIONAL HOLE IN THE JACKET – OR I'M SORRY, IN THE SHIRT. AND YOU CAN SEE THERE ARE MULTIPLE HOLES HERE ALL ACROSS THE UPPER BACK OF THE SHIRT, STARTING OVER HERE AT THIS RIGHT SHOULDER AND GOING ALMOST ALL THE WAY [1826] ACROSS THE BACK.

THERE WAS A SMALL HOLE DOWN HERE THAT CORRESPONDED TO THE STAB WOUND IN THE LOWER BACK.

ON THE FRONT OF THE SHIRT, THERE'S A STAB WOUND OR STAB HOLE IN THE SHIRT HERE IN THE UPPER MID-CHEST CLOSE TO THE STERNUM AND THEN HERE ON THE RIGHT SIDE, THERE ARE FOUR STAB HOLES IN A ROW. ONE HERE JUST BELOW AND ACTUALLY ON THE SIDE OF THE RIGHT BREAST AND THEN THREE IN THE ABDOMINAL REGION. EVEN THOUGH THEY WENT THROUGH THE CARTILAGE AND THE RIB AREA, THAT PART OF YOUR RIB AREA COVERS YOUR LIVER AND PART OF YOUR ABDOMINAL ORGANS, SO EVEN THOUGH IT'S IN

PART OF THE CHEST REGION, IT WENT INTO THE LIVER AND THE ABDOMINAL CAVITY.

Q AND THIS WAS THE BRA THAT SHE WAS WEARING, DOCTOR, AND THERE'S ALSO CUT MARKS ON THE BRA?

A PRIMARILY ON THE BACK OF THE BRA, BUT HERE YOU CAN SEE ONE THAT I MENTIONED EARLIER WAS ON THE SIDE OF THE RIGHT BREAST. HERE ON THE BACK OF THE BRA WERE MULTIPLE STAB HOLES THAT INTERSECTED AND ANOTHER ONE HERE ON THE LEFT BACK. THERE WERE AT LEAST THREE OR FOUR THAT YOU CAN SEE HERE ON THE BACK OF THE BRA JUST ON THE THIN STRAP THAT WENT ACROSS AT THAT LOCATION.

Q AND THE PANTS?

A THE PANTS HAD ONE STAB HOLE HERE IN THE RIGHT BUTTOCKS THAT CORRESPONDED TO THE STAB WOUND IN THE RIGHT [1827] BUTTOCKS. AND THEN THIS ONE AT THE BELT LINE WHICH CORRESPONDED TO THE ONE IN THE LOWER BACK.

Q ON THIS PHOTOGRAPH 23, IS THAT THE STAB TO THE RIGHT – TO THE BUTTOCKS YOU WERE TALKING ABOUT?

A YES. THIS IS A PHOTOGRAPH OF THE DECEDENT AT THE SCENE AND YOU SEE THE STAB HOLE THROUGH THE CLOTHING IN THE BUTTOCKS REGION AND BLOOD IN THAT AREA.

Q THANK YOU, DOCTOR.

NOW, YOU HAVE TESTIFIED PREVIOUSLY ABOUT THERE BEING MOVEMENT DURING THE STABBING OF MS. SHEALY?

A THAT'S CORRECT.

Q AND VARIOUS ANGLES IN WHICH THE STAB WOUNDS WERE –

A THAT'S CORRECT. NOT ONLY A MOVEMENT OF THE CLOTHING SO THAT THE HOLES IN THE CLOTHING DO NOT ALWAYS CORRESPOND TO HOLES UNDERNEATH THEM, WHEREAS THE HOLES IN THE SKIN MIGHT BE CLOSER TOGETHER THAN THE HOLES IN THE CLOTHING INDICATING THE CLOTHING MOVED BETWEEN THE STAB WOUNDS. PLUS THE STAB WOUNDS ARE GOING IN AT DIFFERENT ANGLES INSTEAD OF A NUMBER OF THEM GOING IN EXACTLY THE SAME PARALLEL PATH WHICH WOULD SUGGEST THERE WAS NO MOVEMENT.

Q NOW, DR. SEXTON, HAVE YOU HELPED PREPARE AN EXHIBIT FOR US TO SHOW ALL THESE DIRECTIONS IN WHICH THE WOUNDS WENT IN AND THE VARIOUS PLACES ON THE BODY?

A YES, I HAVE.

Q WOULD THAT BE OF ASSISTANCE TO YOU IN EXPLAINING ALL [1828] OF THOSE TO THE JURY?

A YES, IT WOULD.

Q REFERRING TO 117, DOCTOR, LET'S TALK ABOUT THE BACK FIRST AND I'M GOING TO LET YOU GO OVER THIS ANY WAY YOU WANT TO.

A THIS IS A MODEL WHERE THE DIAGRAM THAT I DREW EARLIER WAS BLOWN UP ON POSTER PAPER AND THEN ATTACHED TO STYROFOAM SO THAT THE PROBES WOULD STAY IN PLACE.

THE PROBES THAT HAVE GREEN ENDS WERE THE FIVE FATAL STAB WOUNDS THAT ENTERED THE BACK OF THE BODY. AS YOU CAN SEE FROM THE WAY THESE GO IN, THEY'RE GOING IN AT DIFFERENT ANGLES, BOTH LEFT, RIGHT, UP AND DOWN. STARTING WITH THE ONE HERE ON THE BUTTOCKS THAT YOU SEE GOING FROM RIGHT TO LEFT. THE ONE IN THE LOWER BACK GOING UPWARD AND TO THE RIGHT. ALL OF THEM GO FORWARD, OBVIOUSLY. MANY OF THESE ON THE UPPER BACK GO DOWNWARD, BUT YOU CAN SEE SOME THAT ARE ACTUALLY GOING UPWARD AND THEY ARE GOING IN ANGLES TO THE LEFT AND RIGHT. SOME ARE VERY LONG. THIS IS ONE THAT PRODUCED TWO WOUNDS INSIDE THE BODY BECAUSE AS YOU CAN SEE, IT CAME IN ALONG ONE PATH AND THEN WENT OUT AND THEN BACK IN CREATING A SECOND PATH SUCH THAT THE LUNG WAS PENETRATED TWICE EVEN THOUGH THE SKIN WAS ONLY PENETRATED ONCE WITH A V-SHAPED TYPE OF WOUND EXTERNALLY.

HERE'S THE ONE THAT'S IN THE ARM WHICH IS GOING PRETTY MUCH STRAIGHT IN. THE ONES HERE ON THE BACK OF THE [1829] NECK ARE NEAR THE SKULL, BUT ARE IN THE SOFT TISSUE AND MUSCLE THAT'S JUST BELOW THE SKULL. AND YOU CAN SEE ONE HERE IN THE MIDLINE GOING TO THE LEFT. ANOTHER UP UNDER THE EAR. IN FACT, TWO

UNDER THE EAR THAT ARE GOING TO THE RIGHT SLIGHTLY DOWNWARD.

THE ONES THAT DO NOT HAVE THE GREEN ON IT ARE SUPERFICIAL, MEANING THAT THEY HAVE PENETRATED THE SKIN AND SOFT TISSUE, BUT HAVE NOT GONE INTERNALLY TO HIT ANY MAJOR VESSELS INTERNALLY, ALTHOUGH THEY COULD HIT SMALL ARTERIES AND VEINS IN THE SOFT TISSUE, BUT HAVE NOT PENETRATED INTO THE BODY CAVITY.

THERE'S ALSO HERE ON THE TOP OF THE HEAD AND MOSTLY ON THE BACK OF THE HEAD, BUT ON THE BACK TOP OF THE HEAD IS A LONG GASH THAT HAS SHARP CLEAN EDGES. WE DISTINGUISHED BETWEEN BLOWS THAT SPLIT THE SKIN AND KNIFE WOUNDS THAT SPLIT THE SKIN IN THAT BLOWS CAUSE DAMAGE TO THE EDGE OF THE WOUND. WE REFER TO THIS AS AN ABRASION ALONG THE EDGE SO THAT IT ACTUALLY PINCHES THE TISSUE BETWEEN THE HARD OBJECT AND THE BONE UNDERNEATH. THAT WAS NOT PRESENT HERE. THIS WAS A SHARP CUT. THERE ARE THREE WAYS IT COULD BE INFLICTED. AS I MENTION EARLIER IN TESTIMONY, THE FACT THAT IT MADE A CUT IN THE BONE THAT WAS IN THE MIDDLE OF THAT CHARACTERIZED BY THE BLACK LINE STRONGLY SUGGEST IT WAS A CHOP BECAUSE IT HAD ENOUGH FORCE TO THEN PENETRATE THE BONE FOR ABOUT AN EIGHTH OF AN INCH. [1830] THERE'S AT LEAST THE POSSIBILITY IT'S AN INCISED WOUND WHERE IT'S JUST CUT STRAIGHT DOWN WITH A LOT OF FORCE SO AS TO DO THE SAME.

AND LASTLY, IT COULD BE A STAB WHERE ONLY THE TIP OF THE BLADE WENT IN FROM ABOVE GOING DOWNWARD. I THINK THAT'S MUCH LESS LIKELY.

Q DOCTOR, STOP THERE IF YOU WOULD. SHOWING YOU STATE'S EXHIBIT NUMBER 113. WOULD YOU EXPLAIN TO THE JURY WHAT YOU'RE TALKING ABOUT, THE HEAD WOUNDS AND THE WOUNDS UP IN THE NECK AREA, ON UP.

A 113 SHOWS THE BACK OF THE NECK AND THE BACK OF THE HEAD. THE WOUND I JUST DISCUSSED WITH YOU ON THE UPPER BACK OF THE HEAD IS THIS ELONGATED INCISED WOUND, MEANING IT'S MOST LIKELY A CUT WITH A SHARP EDGE MOVING FROM ONE END TO THE OTHER OR A CHOP.

HERE ARE THE THREE STAB HOLES THAT I CHARACTERIZED HERE, HERE AND HERE WITH THE PROBE (INDICATES). ONE IN THE MIDDLE OF THE NECK AND TWO ON THE LEFT SIDE. ONE RIGHT AT THE HAIRLINE AND THIS ONE IN THE TOP OF THE LEFT SHOULDER NEAR THE EDGE OF THE NECK IS THIS WOUND THAT'S HERE JUST ABOVE THE LABEL.

AND I SHOULD MENTION THAT HERE ON THE RIGHT SIDE OF THE FACE IS A SPONGE THAT IS PUT UNDER THE FACE TO PREVENT DISFIGUREMENT OF THE INDIVIDUAL AT THE TIME WE'RE LAYING THEM FACE DOWN ON THE TABLE IN ORDER TO TAKE THE PHOTOGRAPHS. IT'S NOT PART OF THE BODY.

[1831] Q AND 112?

A 112 IS A CLOSE-UP OF THE WOUNDS UP ON THE BACK OF THE HEAD AND YOU CAN SEE THE SHARP EDGE ON THE – EDGE OF THIS WOUNDS INDICATING IT IS AN INCISED TYPE WOUND AS OPPOSED TO A BLOW OR SOME BLUNT OBJECT.

Q NOW, I WANT TO HAND YOU 111 AND 110, AND LET'S START WITH 111 FIRST. IF YOU WOULD COORDINATE THAT WITH THE EXHIBITS OF THE FIGURE WITH THE STICKS?

A 111 IS A PHOTOGRAPH OF THE DECEDENT LYING FACE DOWN SHOWING HER BACK AND IT SHOWS ALL OF THESE WOUNDS THAT ARE HERE CONCENTRATED PRIMARILY IN THE UPPER PART OF THE BACK, BUT, AS I MENTIONED, EVEN THOUGH THEY ARE –

THE COURT: EXCUSE ME, DOCTOR, THE JURORS DOWN HERE ARE HAVING A LITTLE TROUBLE SEEING, SIR.

THE WITNESS: I'M SORRY.

THIS – THIS IS A PHOTOGRAPH SHOWING THE INDIVIDUAL LYING FACE DOWN SO THAT YOU CAN SEE THE WOUNDS HERE PRIMARILY IN THE MIDDLE OF THE UPPER BACK. PLUS THERE'S A WOUND HERE IN THE LOWER BACK AND A WOUND ON THE BUTTOCKS. AND YOU CAN SEE SOME OF THE WOUNDS ON THE RIGHT SIDE AS WELL AS THE WOUNDS UP HERE ON THE BACK OF THE NECK. I WAS MENTIONING THAT EVEN THOUGH THERE'S A CONCENTRATION OF WOUNDS HERE IN THIS ONE AREA, AS YOU CAN SEE FROM THE MANNEQUIN,

THESE WOUNDS ARE GOING IN AT DIFFERENT ANGLES. SO THERE WAS MOST LIKELY MOVEMENT BY ONE OF THE PARTIES, [1832] EITHER THE PERSON DOING THE STABBING OR THE VICTIM OR BOTH.

Q AND THEN 110. DOES THAT MORE CLEARLY SHOW THIS WOUND WHERE YOU WERE TALKING ABOUT GOING IN THE SAME HOLE TWICE?

A 110 IS A PHOTOGRAPH THAT SHOWS A CLOSER VIEW OF THE UPPER PORTION OF THE BACK, AND AS POINTED OUT, THIS WOUND IN THE LOWER PORTION OF THAT IS A VERY DEEP WOUND WHERE IT HAS GONE IN, COME PARTIALLY OUT AND THEN GONE BACK IN AGAIN. AND YOU CAN SEE MORE CLEARLY ON THIS PHOTOGRAPH HOW DEEP THAT WOUND IS, AS WELL AS THE WOUND JUST TO THE RIGHT OF IT WHICH ALSO HAS GONE IN AT ONE ANGLE AND COME OUT AT A SLIGHTLY DIFFERENT ANGLE.

Q OKAY.

A I SHOULD MENTION THE FACT THAT THEY DO GO IN AT ONE ANGLE AND COME OUT AT A DIFFERENT ANGLE, AGAIN, INDICATES MOVEMENT ON THE PART OF ONE OR BOTH PARTIES.

Q SEE IF WE CAN TURN THIS AROUND.

NOW, LET ME SHOW YOU PHOTOGRAPH 115 AND IF YOU CAN COORDINATE THAT WITH 117?

A 115 IS A PHOTOGRAPH SHOWING PRIMARY THE RIGHT SIDE OF THE CHEST AND THE NECK. AS YOU CAN SEE HERE ON THE LOWER RIGHT CHEST, THERE'S A STAB WOUND AT THE EDGE OF THE

RIGHT BREAST. THERE ARE THREE STAB WOUNDS THAT ARE JUST BELOW THAT ON THE RIGHT CHEST AND NOTICE THEY ARE MUCH CLOSER TOGETHER HERE THAN THEY WERE ON THE BLOUSE WHEN WE LOOKED AT THE BLOUSE. THE BLOUSE SHOWED THE WOUNDS FURTHER DOWN [1833] INDICATING MOVEMENT BETWEEN THE SKIN AND – OR THE PERSON'S BODY AND THE CLOTHING BETWEEN THE STABS WOUND.

THERE'S ALSO THIS ONE THAT'S UP ON THE MID-CHEST THAT YOU CAN SEE HERE IN THIS PHOTOGRAPH AND THERE ARE CUTS ON THE NECK. HERE YOU CAN SEE THE SHALLOW CUT THAT'S ON THE RIGHT SIDE OF THE NECK THAT'S CHARACTERIZED HERE. THE DEEPER CUT IS CLOSED AT THIS POINT AND IT EXTENDS FROM THE RIGHT SIDE OF THE NECK ALL THE WAY ACROSS THE NECK IN THIS LOCATION IN THE FRONT OF THE NECK.

Q AND, DOCTOR, YOU SAID THAT ON THE BACK YOU HAD FIVE OF THESE STAKES WITH GREEN TIPS. YOU'VE GOT FIVE ON THE FRONT WITH GREEN TIPS. WHAT DOES THAT INDICATE?

A THAT'S CORRECT. THE GREEN TIPS THAT ARE PRESENT ON ALL FIVE OF THESE MEAN THAT THEY WENT INTO AN AREA OF THE BODY THAT WOULD BLEED SUFFICIENTLY TO BE ENOUGH TO CAUSE DEATH. ALL FIVE OF THESE PENETRATED THE CHEST CAVITY OR LIVER, WHICH IS IN THE UPPER ABDOMINAL CAVITY OR THE ABDOMINAL CAVITY AND STRUCK ORGANS THAT WOULD BLEED SUFFICIENTLY TO CAUSE DEATH. AND ALL OF

THESE CONTRIBUTED TO THE LOSS OF BLOOD INTO THE RIGHT CHEST AS WELL AS EXTERNALLY.

Q I WANT TO SHOW YOU 114 AND WHERE DOES THAT WOUND APPEAR ON OUR EXHIBIT HERE 117?

A 114 SHOWS THE RIGHT SIDE OF THE NECK AND IT SHOWS THE NATURE OF THIS VERY SUPERFICIAL WOUND ON THE RIGHT SIDE OF [1834] THE NECK THAT DOESN'T EVEN OR DOESN'T PASS THROUGH THE SKIN LAYER OVER HALF THE WOUND. THIS PORTION OF IT THAT I'M POINTING TO WHICH IS THE POSTERIOR OR HALF TOWARDS THE BACK OF THE NECK ONLY PASSES SHALLOW IN THE SKIN. THE OTHER PORTION ACTUALLY PENETRATES INTO SUBCUTANEOUS TISSUE. BUT THAT'S A FAIRLY SHALLOW WOUND ON THE SIDE OF THE NECK. IT WOULD NOT HAVE BEEN FATAL BUT WOULD HAVE BEEN PAINFUL.

Q AND THEN LASTLY, DOCTOR, REFERRING TO 116, IF YOU WOULD DESCRIBE TO THE JURY WHAT THAT IS RELATED TO THE EXHIBIT WE HAVE HERE.

A 116 IS AN ILLUSTRATION OF THE INCISED WOUND ACROSS THE NECK. THERE ARE ACTUALLY TWO WOUNDS. WE HAVE TILTED THE HEAD BACK A LITTLE WAYS SO THAT NOW YOU CAN SEE HOW DEEP THIS WOUNDS IS BECAUSE IT NOW GAPES. AND HERE YOU CAN SEE THAT THERE'S A SHARP EDGE THAT CONTINUES ALL THE WAY OVER HERE TO THE LEFT AND THEN THERE'S A V-SHAPED ISLAND OF TISSUE AND THEN ANOTHER INCISED WOUND THAT STARTS OVER HERE – OR I

SHOULDN'T SAY STARTS THERE BECAUSE IT DID NOT HAVE A CHARACTERISTIC TYPE OF LITTLE SCALLOPING TO SHOW IN WHICH DIRECTION THESE OCCURRED. THEY COULD HAVE OCCURRED IN EITHER DIRECTION. BUT HERE WERE AT LEAST TWO CUTS IN THE NECK. ONE SEVERED THE TRACHEA, WHICH YOU CAN SEE IS THIS ROUND STRUCTURE IN THE UPPER PART OF THE NECK. YOU CAN ALSO SEE SOME VOMITUS INSIDE THE TRACHEA IN THE UPPER PORTION. YOU CAN'T SEE THE LOWER PORTION BECAUSE IT'S [1835] SEPARATED, BUT THERE'S NO VOMITUS IN THE LOWER PORTION OF THE AIRWAY, ONLY IN THE UPPER PORTION.

Q WHAT DOES THAT MEAN, DOCTOR? YOU HAD VOMIT IN THE UPPER PART, BUT NOT IN THE LOWER PART? WHAT DOES THAT MEAN?

A WHEN A PERSON VOMITS AND THEN ASPIRATES, IT MEANS THAT THEY ALLOW BLOOD OR GASTRIC CONTENT, WHICH WE ARE ALL FAMILIAR WITH, VOMITUS COME UP OUT OF THEIR STOMACH.

IF THEY THEN ASPIRATED INTO THEIR AIRWAY, IT GENERALLY GOES ALL THE WAY DOWN INTO THEIR LUNGS AND CAN ACTUALLY CAUSE PNEUMONIA AND DEATH; OR CAN CAUSE ACUTE DEATH FROM OCCLUDING THE AIRWAY ITSELF FROM THE EFFECTS OF THE ACID. THE FACT THAT THE VOMITUS DID NOT GET INTO THE LOWER AIRWAY INDICATES TO ME THAT THE VOMITING OCCURRED AFTER THE CUT THROUGH THE TRACHEA SO THAT IT WAS ABLE TO COME DOWN TO THIS POINT AND

SPILL OUT, BUT COULD NOT COMMUNICATE WITH THE LOWER AIRWAY WHICH WAS CLEAN.

AS I MENTIONED, THERE ARE TWO CUTS ACROSS THE FRONT OF THE NECK. ONE THROUGH THE TRACHEA. THE ESOPHAGUS IS INTACT WHICH IS BEHIND THE TRACHEA. THERE WAS A CUT THROUGH THE LEFT JUGULAR VEIN HERE ON THE – ON THIS SIDE. THERE WAS NO CUT THROUGH EITHER OF THE MAJOR VESSELS IN THE BACK OF THE NECK, THE ARTERIES, ONLY THE LEFT JUGULAR VEIN.

Q WOULD YOU SHOW THAT VOMITUS STUFF STARTING DOWN THERE AND COMING DOWN THIS WAY? IT'S KIND OF HARD TO SEE.

[1836] A. THE TRACHEA IS THIS ROUND STRUCTURE THAT YOU CAN SEE PART OF HERE AND THE BLACK MATERIAL INSIDE IS THE VOMITUS.

THE TRACHEA BEING THIS SORT OF SEMI-CIRCULAR AREA. IT'S A CARTILAGINOUS RING THAT HOLDS THE AIRWAY OPEN. AND THAT'S THE TRACHEA. THE BLACK MATERIAL BEING THE VOMITUS IN THE TRACHEA.

Q NOW, DOCTOR, LET ME ASK YOU A QUESTION AND I'M GOING TO TURN THIS SIDEWAYS. THESE STAB WOUNDS AND I THINK YOU SAID IT WAS THIRTY-ONE, NOT INCLUDING THE NECK AND THE THROAT?

A THAT'S CORRECT.

Q SO THAT WOULD BE THIRTY-TWO, THIRTY-THREE – THIRTY-FOUR BECAUSE THERE ARE TWO UP THERE. WOULD THESE HAVE BEEN PAINFUL?

A WE HAVE ALL BEEN CUT BY SOME OBJECT, GLASS OR A KNIFE OR PAPER AND WE ALL REALIZE IT IS PAINFUL. NOW, THERE ARE CERTAIN PARTS OF THE BODY WHERE IT'S MORE PAINFUL. HANDS HAVE MORE SENSORY RECEPTORS THAN OTHER PARTS OF THE BODY, BUT ANY TIME YOU CUT YOURSELF, IT'S PAINFUL. SO IN MY OPINION, ALL OF THESE WOULD HAVE BEEN PAINFUL. SOME WOULD HAVE BEEN MORE PAINFUL THAN OTHERS.

Q WOULD DEATH HAVE BEEN INSTANTANEOUS IN THIS SITUATION, DOCTOR?

A NO, IT WOULD NOT IN MY OPINION WITHIN REASONABLE MEDICAL CERTAINTY BECAUSE FOR ONE THING, IN ORDER FOR THERE [1837] TO BE A RED COLOR TO THE FAT – WE ALL HAVE A THIN AREA OF FAT CALLED THE PANNICULUS UNDER OUR SKIN. WHEN WE MAKE A DISSECTION AT THE TIME OF AUTOPSY, AT DEATH, WE SEE A YELLOW PANNICULUS. THE SKIN IS NORMAL AND THE FAT UNDERNEATH IT IS YELLOW. WHEN WE SEE A PERSON WHO HAS BEEN STABBED OR CUT DURING LIFE BECAUSE THE HEART IS STILL PUMPING BLOOD UNDER PRESSURE AND THAT BLOOD LEAKS OUT OF THE SMALL CAPILLARIES THAT ARE DISRUPTED BY THE CUT OR STAB INTO THE SURROUNDING TISSUE SO WE CANNOT WASH IT OFF, SUCH – THIS TYPE OF INJURY WE CALL A CONTUSION OR A BRUISE JUST AS THE SAME TYPE OF BRUISE YOU WOULD GET IF

YOU INJURED YOURSELF AND HAD TURNED PURPLE.

ALL OF THESE WOUNDS HAD THIS TYPE OF HEMORRHAGE IN THE TISSUE THAT WOULD NOT WASH OFF. SO ALL OF THESE STAB WOUNDS AND INCISE WOUNDS OCCURRED WHILE THE HEART WAS STILL BEATING. NONE OF THESE WERE RAPIDLY FATAL. HAD IT GONE THROUGH THE CAROTID ARTERIES, IT COULD HAVE BEEN RAPIDLY FATAL, BUT EVEN THEN, IF A PERSON HAS THEIR NECK CUT COMPLETELY SO IT GOES DOWN TO THE ARTERIES, IT TAKES A MATTER OF SECONDS FOR YOU TO BLEED ENOUGH TO NOT HAVE ENOUGH BLOOD IN YOUR HEART TO GET TO YOUR BRAIN AND AT THE POINT WHERE YOU HAVE NO BLOOD GOING TO YOUR BRAIN, YOU HAVE TEN TO FIFTEEN SECONDS OF CONSCIOUSNESS BEFORE YOU PASS OUT.

A PERSON IN AN I.C.U. UNIT WHO IS BEING MONITORED [1838] WHOSE HEART STOPS ON THE MONITOR, WHEN THE NURSE WALKS IN, THEY – THE PATIENT DOESN'T REALIZE THAT, BUT THEN A FEW SECONDS LATER, TEN OR 15 SECONDS AFTER THE EVENT, THEY DO PASS OUT.

SO ALL OF THESE OCCURRED DURING THE TIME THE HEART WAS BEATING. THERE'S NOTHING THAT WOULD BE INSTANTANEOUSLY FATAL AND NOTHING THAT WOULD EVEN BE RAPIDLY FATAL. ALL OF THEM WERE INFLICTING WOUNDS THAT WOULD CAUSE BLEEDING, BUT ONLY TEN THAT WENT IN HIT THE LUNG WHICH IS A LOW PRESSURE SYSTEM IN THE BODY. IT'S NOT WHERE WE HAVE A LOT OF

BLOOD COURSING THROUGH THERE UNDER PRESSURE. SO THE BLOOD WOULD HAVE BEEN COMING OUT SLOWLY. SOME OF THE SUPERFICIAL STAB WOUNDS MAY HAVE HIT SMALL ARTERIES THAT MAY SPURT, BUT NOT ENOUGH TO CAUSE RAPID DEATH.

Q WHAT ABOUT THE ONES ON THE THROAT? WOULD THAT –

A AS I MENTIONED, THE ONE TO THE THROAT WOULD NOT HAVE – DID NOT PENETRATE ANY ARTERIES OF MAJOR SIZE, ONLY SUPERFICIAL AND IT'S NEAR THE SURFACE. IT DID CUT THROUGH THE AIRWAY, BUT THE PERSON COULD STILL BREATH THROUGH THAT AIRWAY.

Q THEY WOULD HAVE BEEN BREATHING THROUGH THE CUT?

A THAT'S CORRECT.

Q NOW, THE WAY THESE DIRECTIONS ARE – THIS IS NOT JUST A RAPID ONE MOVEMENT THING. THESE CAME FROM ALL KIND OF [1839] DIFFERENT DIRECTIONS, IS THAT CORRECT?

A I CAN'T SPEAK TO THE SPEED, BUT, YES, THEY CAME FROM ALL DIFFERENT DIRECTIONS. OBVIOUSLY, A PERSON CAN BE STABBED MULTIPLE TIMES VERY QUICKLY.

IN OTHER WORDS, YOU COULD INFLICT SIXTY STAB WOUNDS ON A PERSON IN A MINUTE'S TIME. BECAUSE YOU CAN CERTAINLY STAB SOMEBODY IN LESS THAN A SECOND OR WITHIN A SECOND. SO I DON'T HAVE ANY WAY OF KNOWING HOW

QUICKLY OR HOW SLOWLY THESE OCCURRED. ALL I CAN SAY IS THAT THEY COULD HAVE OCCURRED RAPIDLY, BUT THERE HAD TO BE MOVEMENT BETWEEN THE TWO PARTIES, EITHER ON THE PART OF ONE OR BOTH BETWEEN MOST OF THE STAB WOUNDS BECAUSE THERE ARE HARDLY ANY THAT FOLLOW THE SAME PATH IN THE BODY. AND SO IT HAS TO TAKE SOME PERIOD OF TIME, BUT I CANNOT GIVE YOU A SPECIFIC PERIOD OF TIME.

Q YOU TESTIFIED THE OTHER DAY THERE WERE NO DEFENSIVE WOUNDS?

A THAT'S CORRECT.

Q AND WHAT DID YOU MEAN BY THAT?

A THE FACT THERE WERE NO WOUNDS ON THE HANDS, ARMS OR LEGS WHICH OCCUR WHEN A PERSON IS TRYING TO PREVENT AN INDIVIDUAL FROM CUTTING THEM WITH SOME SHARP OBJECT, THEY HAVE NOTHING TO DEFEND THEMSELVES WITH BUT THEIR EXTREMITIES, SO THOSE AREAS OF THE BODY GET CUT. OFTENTIMES THE HAND WILL GRAB THE KNIFE AND THERE WILL BE A [1840] CUT IN THE HAND AND THERE WERE NONE OF THOSE PRESENT.

Q NOT HAVING ANY DEFENSIVE WOUNDS, I'M SHOWING YOU 108, THE HANDS AND THE BACK BOUND WITH TAPE AND APPARENTLY NO BLOOD ON THEM.

DO YOU HAVE AN OPINION AS TO WHETHER HER HANDS WERE TIED OR WHETHER THEY WERE

FREE WHEN THESE STAB WOUNDS WERE INFLICTED?

A IN MY OPINION WITHIN REASONABLE MEDICAL CERTAINTY, HER HANDS WERE BOUND AT THE TIME SHE WAS STABBED BECAUSE THERE'S NO BLOOD ON THEM. GRANTED THE CLOTHING COULD HAVE PROTECTED THAT, BUT ONLY IF HER HANDS STAYED UNDER THAT CLOTHING. SO IN MY OPINION, SINCE THERE ARE NO DEFENSIVE WOUNDS, THERE IS NO BLOOD ON THE HANDS, HER HANDS, IN MY OPINION, WERE MOST PROBABLY BOUND AT THE TIME SHE WAS STABBED.

Q THANK YOU, DOCTOR. RETURN TO YOUR SEAT.

A (WITNESS COMPLIES.)

Q DOCTOR, I THINK YOU TESTIFIED THE OTHER DAY THOSE TEN WOUNDS WITH THE GREEN TIP BEING THE CAUSE OF DEATH AND HOW DID SHE DIE? WHAT WAS IT INSIDE?

A BY EXSANGUINATION OR SIMPLY BLEEDING TO DEATH, BY BLOOD BLEEDING OUT OF THOSE VESSELS INTO THE BODY CAVITY AS WELL AS OUTSIDE THE BODY.

Q SHE WAS PREGNANT?

A THAT'S CORRECT.

MS. FULLWOOD: YOUR HONOR, THE SAME OBJECTION AS [1841] WE MADE EARLIER.

THE COURT: OBJECTION IS OVERRULED. I NOTE YOUR OBJECTION.

THE SOLICITOR: TELL THE JURY ABOUT THE BABY, DR. SEXTON.

MS. FULLWOOD: WE MAKE THE SAME OBJECTION, YOUR HONOR.

THE COURT: NOTE YOUR OBJECTION. IT'S OVERRULED.

THE WITNESS: AT THE TIME OF AUTOPSY, WHEN WE EXAMINED THE INTERNAL ORGANS, WE FOUND THE DECEDENT WAS PREGNANT WITH A FETUS THAT WAS A WELL-DEVELOPED NORMAL APPEARING FETUS THAT WAS VERY PALE AND THE PLACENTA ATTACHED TO THE FETUS WAS ALSO PALE INDICATING THERE WAS NO BLOOD PRESENT IN EITHER TO THE NORMAL EXTENT THAT YOU EXPECTED. THERE WAS NO DISEASE OR ANY CONGENITAL DEFECT NOTED IN THE FETUS. THE FETUS WAS ESTIMATED TO BE ABOUT 23 WEEKS OF GESTATION, WHICH IS JUST SHORT OF SIX MONTHS, APPROXIMATELY SIX MONTHS. AND IN MY OPINION, BASED ON THE ABSENCE OF ANY CONGENITAL DEFECT, ANY DISEASE OR ILLNESS, AND THE LACK OF BLOOD BOTH IN THE BODY OF THE MOTHER AND THE BODY OF THE CHILD, THE CHILD DIED FROM LOSS OF BLOOD, LOSS OF NUTRIENTS BECAUSE OF THE MOTHER'S DEATH.

Q BOY OR GIRL?

A A LITTLE BOY.

Q AND WAS THERE ANYTHING ABOUT THAT LITTLE BOY THAT YOU [1842] COULD DETECT, WAS

ANYTHING ABNORMAL? ANY KIND OF DEFORMITY ANYTHING AT ALL?

A I SAW NOTHING ABNORMAL.

Q NOW, YOU SAID 23 WEEKS OF GESTATION. YOU DIDN'T TALK TO THE OB-GYN OR THE FAMILY MEMBERS OR ANYTHING ABOUT THAT?

A NO. THIS IS BASED ON – WE MEASURE THE LENGTH OF THE CHILD AND WEIGH THE CHILD AND DO OTHER DETERMINATIONS THAT GIVE US INDICATIONS FROM LOOKING AT TABLES AND THERE'S AN ESTIMATE OF THE AGE OF THE CHILD WHICH ARE EXTREMELY ACCURATE.

Q FROM YOUR EXAMINATION OF THE BABY, DO YOU HAVE AN OPINION AS TO IF THE MOTHER HAD LIVED A FULL TERM THAT BABY WOULD HAVE LIVED?

A IN MY OPINION, IT WOULD. IN FACT, AT THE TIME OF THE MOTHER'S DEATH, IF THE BABY IN SOME WAY COULD HAVE BEEN GOTTEN OUT OF THE UTERUS AT THAT TIME AND IMMEDIATELY CARED FOR, THERE ARE INFANTS THAT ARE SMALLER THAT ARE BORN IN HOSPITAL SETTINGS THAT SURVIVE. AS FAR AS WHETHER IT WOULD HAVE SURVIVED AT THIS TIME IF IT HAD BEEN BORN AT THE TIME OF THE INJURY TO THE MOTHER, I DOUBT IF THAT WOULD HAVE BEEN PROBABLE IN THAT SETTING. IT WOULD HAVE TO BE IN A HOSPITAL SETTING AND HAVE TO BE CARED FOR IMMEDIATELY.

Q SO BEING BORN, SAY AT HOME, THAT WOULD HAVE BEEN A LESSER CHANCE OF THE BABY SURVIVING?

A THAT'S CORRECT. AT THIS AGE AND SIZE.

[1843] Q IF MS. SHEALY HAD BEEN IN A HOSPITAL AT THE TIME THAT SHE WAS MURDERED –

MR. KIRKLAND: YOUR HONOR, I'M GOING TO OBJECT TO THAT. I THINK HE'S GOING A LITTLE OUTSIDE HIS AREA OF EXPERTISE.

THE SOLICITOR: HE'S AN EXPERT.

THE COURT: I SUSTAIN THE OBJECTION.

THE SOLICITOR: DOCTOR, LET ME ASK YOU THIS. THE AUTOPSY THAT YOU PERFORMED ON MS. SHEALY, TAKEN ALL OF THIS INTO ACCOUNT, IS IT YOUR OPINION THAT THAT BABY WAS A HEATHY BABY?

[1913] **DR. STEVEN SHEA – DIRECT BY MS. FULLWOOD**

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Q DR. SHEA, AS A RESULT OF YOUR REVIEW OF THE RECORDS AND THE TESTING YOU DID ON BILLY AND THE TIME YOU WENT – YOU DID SPEND WITH BILLY, DO YOU HAVE. AN OPINION AS TO WHETHER OR NOT BILLY IS MENTALLY ILL?

A YES, I DO. I DON'T BELIEVE THAT HE'S MENTALLY ILL.

Q WERE THERE ABNORMALITIES IN THE TESTING?

A HIS INTELLIGENCE WAS IN THE AVERAGE RANGE. HIS READING LEVEL WAS LOW FOR HIS AGE AND INTELLIGENCE, BUT IT PRETTY MUCH STAYED WHERE HE WAS WHEN HE GOT OUT OF SCHOOL. THE PERSONALITY TEST DID NOT INDICATE A MAJOR MENTAL ILLNESS, NOT A THOUGHT DISORDER, NOT PERSONALITY DISORDER. ESSENTIALLY, I – MY EVALUATION DID NOT SHOW THAT HE HAD A SIGNIFICANT MENTAL ILLNESS.

Q BASED UPON ALL OF THE INFORMATION THAT YOU HAVE CONCERNING BILLY, DO YOU HAVE ANY DIAGNOSIS THAT YOU CAN PIN ON HIM AT ALL?

A HE DIDN'T HAVE A PATTERN OF SEVERE ALCOHOL ABUSE, BUT HE WAS DRINKING AND – BEFORE HE GOT ARRESTED, HE WAS DRINKING AND HE WAS ALSO UNDERAGE. MY DIAGNOSIS WOULD BE ALCOHOL ABUSE IN REMISSION. HE'S LOCKED UP. SO HE'S IN A CONTROLLED ENVIRONMENT. HE'S NOT DRINKING NOW. HE MAY HAVE BEEN ON HIS WAY TO AN ALCOHOL PROBLEM. I WOULD GIVE [1914] HIM MOSTLY THAT DIAGNOSIS BECAUSE HE WAS DRINKING AT THAT AGE.

Q OKAY. WHEN YOU SAY, HE WAS DRINKING, DO YOU MEAN EVERYDAY, ALL THE TIME?

A NO, HE WAS DRINKING EPISODICALLY WITH HIS FRIENDS. WHEN HE DRANK, HE TENDED TO GET DRUNK. HE WAS – HE WAS EXPERIMENTING

WITH ALCOHOL THE WAY SOME TEENS DO, NOT IN A VERY HEALTHY WAY, BUT NOT NECESSARILY AN INDICATION THAT HE WAS AN ALCOHOLIC OR ANYTHING, BUT – AND IT'S A CONCERN WHEN SOMEBODY IS SIXTEEN, SEVENTEEN AND DRINKING.

Q I UNDERSTAND THAT'S OBVIOUSLY A MATTER TO BE CONCERNED ABOUT, BUT IN THAT AGE GROUP, IS IT ABNORMAL TO SEE?

A IT'S NOT – IT NOT TYPICAL, BUT IT'S NOT ABNORMAL EITHER.

IT'S SOMETHING THAT A LOT OF TEENS DO. HOPEFULLY THEY GROW OUT OF IT. EITHER, YOU KNOW, LEARN TO DRINK RESPONSIBLY OR NOT AT ALL.

Q OKAY. NOW, DR. SHEA, BASED UPON THE WORK THAT YOU HAVE DONE BOTH WITH BILLY IN PERSON AND ON YOUR REVIEW OF THE RECORDS, HAVE YOU BEEN ABLE TO FORM AN OPINION AS TO HOW BILLY WOULD ADJUST TO INCARCERATION?

A I DO HAVE AN OPINION ON THAT. YES.

Q OKAY. DR. SHEA, WHAT TYPES OF THINGS DO YOU HAVE TO LOOK AT WHEN YOU TRY TO ASSESS HOW A PERSON IS GOING TO ADAPT TO A PRISON ENVIRONMENT?

[1915] A I DID A FAIR AMOUNT OF THIS WHEN I WORKED FOR THE DEPARTMENT OF CORRECTIONS.

SOMETIMES THERE WERE QUESTIONS. IF SOMEBODY WOULD COME INTO A PRISON AND THEY'D

WANT TO KNOW IS THIS GUY OKAY TO GO INTO POPULATION, DO WE NEED TO LOCK HIM UP – EXCUSE ME, DO WE NEED TO LOCK HIM UP, WHAT DO WE NEED TO DO.

BASICALLY WHAT YOU DO IS YOU LOOK AT WHETHER OR NOT THERE'S ANY MENTAL ILLNESS OR ABNORMALITY GOING ON. ARE YOU GOING TO SEE, YOU KNOW, BIZARRE BEHAVIOR, THINGS THAT MOST PEOPLE CAN'T UNDERSTAND.

YOU ALSO LOOK AT WHAT – WHAT ARE THE CONDITIONS UNDER WHICH SOMEBODY IS VIOLENT. PEOPLE ARE RARELY VIOLENT ALL THE TIME. WHEN – WHEN DO THEY ACT UP? WHO DO THEY ACT UP AGAINST? WHAT KEEPS THEM FROM ACTING UP AND WHAT IS THE SITUATION THAT THEY ARE GOING INTO? SO YOU LOOK AT THE PATTERN OF WHAT THEY DO THAT'S A PROBLEM AND SEE WHETHER OR NOT IT FITS THE INSTITUTIONS,

Q OKAY. NOW – NOW, IN BILLY'S CASE, YOU'VE ALREADY TOLD THE JURY, HE DOES NOT HAVE ANY MAJOR MENTAL ILLNESS?

A NOT THAT I FOUND, NO.

Q WHAT ABOUT THE HISTORY OF VIOLENCE IN THIS CASE?

A THERE'S RELATIVELY NO HISTORY OF VIOLENCE. THERE WERE A COUPLE OF NORMAL SCHOOLBOY FIGHTS GROWING UP. THERE WAS A LARGER FIGHT THAT HE WAS PROVOKED INTO DEFENDING A [1916] FRIEND OF HIS THAT HE LOST. ESSENTIALLY THIS IS A SMALLER – A SMALL GUY

WHO WAS ALWAYS SMALL AND YOUNG LOOKING FOR HIS AGE WHO HAD A HISTORY OF TALKING HIS WAY OUT OF FIGHTS, RATHER THAN GETTING INTO THEM. THIS WAS A FAIRLY ISOLATED INSTANCE OF VIOLENCE ON HIS PART.

Q DID YOU SEE ANY INDICATION IN THE WORK THAT YOU DID, THAT BILLY HAD EVER BEEN INVOLVED GANG ACTIVITIES OR ANYTHING OF THAT NATURE.

A I DIDN'T SEE ANY GANG ACTIVITY. I DIDN'T SEE A HISTORY OF VIOLENCE AS A CHILD. I DIDN'T SEE AN INCREASE IN HISTORY OF VIOLENCE, WHICH IS WHAT YOU LOOK FOR IF SOMEBODY IS ON THE PROGRESSION OF GETTING MORE AND MORE VIOLENT ALL THE TIME. HE WOULD HAVE A BIG HISTORY OF FIGHTS. HE HAD NO PRIOR ARRESTS OR CONVICTIONS. I JUST DIDN'T SEE A SIGNIFICANT HISTORY OF VIOLENCE LEADING UP TO THIS.

Q OKAY. AND A PERSON'S HISTORY OF VIOLENCE, HOW DOES THAT HELP YOU PREDICT HOW THE PERSON WILL ADAPT TO INCARCERATION?

A WELL, YOU LOOK TO SEE HOW PEOPLE ARE VIOLENT OR WHEN THEY ARE VIOLENT.

IF SOMEBODY FIGHTS ALL THE TIME. IF SOMEBODY IS, YOU KNOW, LOOKING FOR TROUBLE. IF SOMEBODY HAS A HISTORY OF VIOLENCE WHERE THEY START OFF SMALL AND THEN IT GETS WORSE AND WORSE. YOU ARE GOING TO EXPECT IT TO CONTINUE TO GET WORSE AND THAT'S NOT THE

SORT OF THING I [1917] SAW IN THIS PARTICULAR CASE.

Q OKAY. IN MAKING THIS TYPE OF ASSESSMENT, DO YOU ALSO LOOK AT HOW AN INDIVIDUAL DEALS WITH DIFFICULTIES, WITH CONFRONTATIONS?

A YES, I DO. I LOOK AT HOW THEY'RE PROBLEM SOLVING AND HOW THEY'VE MANAGED TO AVOID VIOLENCE IN THE PAST. AND IN THIS CASE, I LOOKED AT HOW HE DID LEADING UP TO THIS AND ALSO IN THE JAIL. I DIDN'T SEE ANY FIGHTS IN THE JAIL. I – I HE DIDN'T HAVE ANY PRIOR EXPERIENCE OF BEING LOCKED UP, SO IT'S KIND OF SURPRISING THAT HE DIDN'T GET INTO AT LEAST ONE OR TWO FIGHTS. HE DIDN'T GET INVOLVED IN ORGANIZED GANGS IN THE JAIL. HE DIDN'T GET INVOLVED IN ANY – LIKE ORGANIZED REBELLING. THERE WAS NO GETTING INVOLVED IN UPRISING OR TRYING TO INCITE ANY UPRISINGS.

HE HAD BEEN APPROACHED BY SOME OF THE HOMOSEXUALS IN THE JAIL AND HE WAS ABLE TO TALK HIS WAY OUT OF THOSE SITUATIONS, RATHER THAN FIGHTING IS WAY OUT OF A SITUATION.

ALSO UNUSUAL WITH PEOPLE WHO DON'T HAVE A WHOLE LOT OF EXPERIENCE – ESSENTIALLY, HE IS A SMALL GUY WHO HIS ONE REAL FIGHT HE'S HAD IN HIS LIFE, HE LOST FAIRLY BADLY. AND HE HAS BEEN ABLE TO TALK HIS WAY OUT OF FIGHTS.

AGAIN, HE'S NOT MENTALLY ILL. THERE WAS NO BIZARRE BEHAVIOR THAT WOULD LEAD TO, YOU KNOW, ACTING OUT THAT NOBODY ELSE UNDERSTOOD. HE DID – WHEN HE WAS ANXIOUS AND STRESSED, HE DID TALK TO A COUNSELOR AT THE JAIL. THE [1918] ONE THING I DO WORRY ABOUT IS ALCOHOL OR DRUG ABUSE AND, YOU KNOW, ALCOHOL AND DRUGS JUST WERE NOT AVAILABLE IN LEXINGTON COUNTY JAIL AND THERE WAS NO LACK OF INHIBITION, YOU KNOW, IN THAT AREA. I JUST DIDN'T SEE ANY HISTORY OF VIOLENCE. ACTUALLY, I SAW HIM CREATIVELY FINDING WAYS TO AVOID VIOLENCE IN THE JAIL SETTING.

Q DID YOU TAKE INTO CONSIDERATION THE JAIL RECORDS THAT SAID THAT HE HAD SOME TYPE OF HOMEMADE WEAPON?

A IT'S THE BIGGEST CONCERN I HAD IN THIS WHOLE AREA WAS ABOUT THE HOMEMADE WEAPON. ONE OF THE THINGS YOU LOOK FOR WHEN YOU'RE ASSESSING FOR THE LIKELIHOOD OF VIOLENCE IS HOW – DO PEOPLE HAVE THE MEANS TO COMMIT BY THEM? DO THEY HAVE A WEAPON? DO THEY HAVE OPPORTUNITY?

AND THE FACT THAT HE MADE WEAPONS IS A HUGE CONCERN. I'VE WORKED IN PRISON AND JAILS AND IN LOCKED UNITS AND I'M THE FIRST ONE TO WORRY ABOUT WEAPONS BECAUSE IT PUTS ME AT RISK AS WELL AS EVERYBODY I WORK WITH. BUT THERE ARE DIFFERENT DEGREES OF WEAPONS

AND DIFFERENT WAYS AND MEANS AND MOTIVATIONS BEHIND THE WEAPONS.

ONE OF THF THINGS WE SEE WITH YOUNGER GUYS AND SMALLER GUYS HAVE A PATTERN OF TRYING TO ESTABLISH THEMSELVES AS BEING FAIRLY TOUGH OR NOT BEING POTENTIAL VICTIMS. AND THEY DO THINGS TO MAKE SURE THAT PEOPLE DON'T TRY TO ATTACK THEM OR DON'T THREATEN THEM.

AND ONE OF THE THINGS THEY DO IS THEY MAKE [1919] KNIVES, BUT THEY MAKE KNIVES IN A WAY THAT'S DIFFERENT FROM MOST OF THE INMATES WHO SCARE ME WORST IS THAT THEY MAKE THEM IN PUBLIC AND SHOW THEM AROUND. THE REASON THAT WE CATCH THEM ALL THE TIME IS BECAUSE THEY MAKE THE KNIVES IN FRONT OF OTHER PEOPLE. THEY SHOW THEM TO OTHER PEOPLE. THEY MAKE LOUD THREATS ABOUT I HAVE GOT A KNIFE AND I'M NOT AFRAID TO USE IT. AND IT'S MORE OF AN ATTEMPT TO PUFF THEMSELVES UP AND APPEAR TO BE NOT AFRAID AND ESSENTIALLY USE IT IN SELF-DEFENSE, NOT TO USE IT IN A FIGHT, BUT TO USE IT SO THAT EVERYBODY THINKS THAT THEY WILL LOOK SOMEWHERE ELSE FOR AN EASIER VICTIM.

THAT WASN'T MY BIGGEST CONCERN, BUT THE WAY HE MADE THEM, THE TYPES OF KNIVES HE HAD AND THE WAY HE SHOWED THEM AROUND WAS LESS OF A CONCERN TO ME THAN SOME OF THE OTHER WAYS THE KNIVES COULD BE USED.

Q HAVE YOU SEEN WORSE LOOKING KNIVES IN YOUR WORK OR WORSE LOOKING SHANKS, HOMEMADE WEAPONS IN PRISON?

A YES, MA'AM. I'VE SEEN A LOT – AND I DON'T WANT TO MINIMIZE THIS – YOU KNOW, ANY OF THE HOMEMADE KNIVES, BUT I'VE SEEN MANY WORSE LOOKING ONES.

ESSENTIALLY WHAT YOU SEE IS THIS IS THE SORT OF THING THAT LESS DANGEROUS GUYS AND LESS TOUGH GUYS RESORT TO TRY TO KEEP THE PREDATORS AT BAY. I MEAN, JAILS AND PRISONS ARE FILLED WITH PEOPLE WHO ARE FAR MORE MEAN AND FOR [sic] MORE DANGEROUS AND FAR MORE VIOLENT THAN MR. KELLY AND [1920] THE SORT OF THINGS YOU SEE WITH, YOU KNOW, FELLOWS LIKE HIM, IS THAT HE'S TRYING TO KEEP THOSE PEOPLE AWAY SO THEY WILL LOOK SOMEWHERE ELSE FOR AN EASIER TARGET.

Q AND THESE PEOPLE ARE PREDATORY IN WHAT WAY?

A PREDATORY IN A LOT OF WAYS. SOME ARE THIEVES. THEY'LL STEAL ANYTHING THAT THEY THINK THEY CAN GET AWAY WITH. STRONG ARMED ROBBERY SORTS OF THINGS. SOME ARE PREDATORY IN A VIOLENT WAY. THEY ARE BULLIES OR JUST ANGRY PEOPLE. OTHERS ARE SEXUAL PREDATORS. THAT THEY LOOK TO YOUNGER, SMALLER INMATES TO SEE IF THEY CAN HAVE SEX WITH THEM OR FORCE THEM INTO SEX. AND I WOULD EXPECT THOSE ALL TO BE PROBLEMS FOR ANY NEWCOMER

IN PRISON. ESPECIALLY SOMEBODY WHO LOOKS YOUNGER THAN 20-YEARS-OLD.

Q OKAY. BASED UPON YOUR REVIEW OF HIS RECORDS AND YOUR WORK WITH HIM, WHEN BILLY IS IN A STRESSFUL SITUATION IN A CORRECTIONAL SETTING, HOW DOES HE COPE? WHAT DOES HE DO?

A ACTUALLY, TO LOOK AT WHAT HE DID IN THE JAIL, HE COPED FAIRLY WELL. THE PROBLEMS I WOULD EXPECT FROM HIM IN THE DEPARTMENT OF CORRECTIONS WILL BE THINGS LIKE – WELL, THE SAME PATTERN OF TRYING TO PUFF HIMSELF UP TO MAKE HIMSELF SEEN [sic] TOUGHER. HE MAY GO THROUGH SOME MORE SHOWY SORTS OF BEHAVIORS. IN THE JAIL, HE HAD A FEW INCIDENTS WHERE HE REFUSED TO GO BACK TO HIS ROOM AND CALLED THE OFFICER'S NAME – CALLED THE OFFICERS' NAMES, CURSED AT [1921] THEM AND I'M NOT GOING BACK, I'M NOT GOING BACK AND THEN THEY ESCORT HIM BACK TO HIS ROOM. NOBODY EVER FOUGHT OVER THAT. IT WAS NO VIOLENCE AND HE PUT ON A BIG SHOW. AND HE NEVER PUT ON A SHOW WITH THE OTHER INMATES WHO MIGHT HIT HIM. HE PUT ON THE SHOW WITH THE OFFICERS WHO WOULD JUST PUT HIM BACK IN HIS ROOM. SO I EXPECT SOMETHING LIKE THAT.

Q FOR THE BENEFIT OF THE OTHER INMATES TO SEE IT?

A RIGHT.

IF HE WENT TO PRISON, WHEREVER HE GOES IN PRISON, HE WILL PROBABLY TRY TO MAKE ANOTHER HOMEMADE KNIFE IN A VERY SHOWY SORT OF WAY, SHOW IT AROUND TO SCARE PEOPLE.

Q DO YOU EXPECT HIM TO USE THE KNIFE IN ANY TYPE OF PREDATORY FASHION?

A WELL, THAT'S NOT BEEN – I'VE NEVER SEEN ANYTHING LIKE THAT IN THE JAIL NOW THAT – LIKE I SAID, THE ONE FIGHT HE HAD BEEN IN, HE LOST. THAT WAS BEFORE HE GOT LOCKED UP. SO I'D EXPECT THAT SORT OF – SOME SORT OF PROBLEMS. I EXPECT HIM TO HAVE PROBLEMS WITH SOME OF THE LARGER MORE PREDATORY INMATES JUST BECAUSE OF HIS SIZE AND HE WILL HAVE TO DO SOMETHING TO MARK UP HIS TERRITORY, TO TRY TO MAKE HIMSELF SEEM LIKE HE'S NOT AN EASY TARGET. WHEREVER HE ENDS UP IN PRISON, I EXPECT TO SEE HIM IN A FEW YEARS HAVE A BUNCH OF TATTOOS, TRY TO MARK HIMSELF UP SO THAT HE WILL LOOK OLDER, TOUGHER. IT'S SOMETHING YOU SEE ESPECIALLY WITH THE SMALLER GUYS. I EXPECT HIM TO BE A [1922] FAIRLY HEAVY USER OF MEDICAL SERVICES. HE'S –

Q WHY?

A HE'S NOT A VERY INSIGHTFUL GUY. WHEN HE FEELS DEPRESSED OR WHEN HE FEELS ANXIOUS, HE DOESN'T REALLY LABEL HIS EMOTIONS AS I'M SAD, I'M NERVOUS. HE TENDS TO LET IT GET TO HIM PHYSICALLY. AND SO HE COMPLAINS OF MY STOMACH HURTS, I'M FEELING QUEASY, THE FOOD

IS BOTHERING ME, I HAVE ACNE, I HAVE HEADACHES.

HE TENDS TO EXPRESS HIS EMOTIONS AS PHYSICAL COMPLAINTS SO HE – WHEN HE'S UNDER PRESSURE, THEY MAY SEE HIM GOING TO SICK HALL MORE THAN MOST INMATES ESPECIALLY AT THE START. THAT'S HOW HE DEALS WITH STRESS AND PRESSURE.

Q IN ARRIVING AT YOUR CONCLUSION, HAVE YOU TAKEN INTO CONSIDERATION THE FACT THAT SOMEONE CHIPPED MORTAR AWAY FROM A CINDER BLOCK IN THE CELL THAT HE WAS STAYING IN WITH TWO OTHER INMATES AND THE FACT THAT SOME INMATES CLAIM THAT – HE TALKED AT TIMES ABOUT ESCAPE?

A I'VE BEEN WORKING IN CORRECTIONAL PLACES FOR A LONG, LONG TIME AND MOST OF THE INMATES I HAVE DEALT WITH HAVE TALKED ABOUT ESCAPE AT ONE TIME OR ANOTHER. IT'S SOMETHING THAT INMATES TALK ABOUT AMONG THEMSELVES. IT'S SOMETHING THAT ESPECIALLY YOUNGER GUYS TALK ABOUT AND THEY TALK ABOUT IT WITH A LOT OF BRAVADO. THEY CAN'T KEEP ME IN HERE. I'M GOING TO GET OUT OF HERE. BUT I SEE VERY LITTLE ACTION ON IT. I READ INCIDENT REPORTS ABOUT HE'S THREATENING TO DO THIS [1923], HE'S THREATENING TO DO THAT, BUT HE NEVER FOLLOWS THROUGH. THERE'S A LOT OF BIG TALK AND SMALL SORTS OF ACTING UP TO MAKE THE OTHER INMATES THINK HE IS, YOU KNOW, AS BAD AS THEY ARE OR NOT AN EASY

TARGET. I'VE SEEN THESE SORTS OF THINGS HAPPEN ON UNITS THAT I'VE RUN AND THEY ARE CONCERNED WITH IT. THIS IS WHY WE HAVE CORRECTION SYSTEMS. THAT'S WHAT CORRECTIONS OFFICERS DO. THAT'S WHAT JAIL OFFICERS DO. THEY MAKE SURE THAT EVEN IF IT IS AN ATTEMPT, IT DOESN'T GET ANY FARTHER THAN THE TALKING OR THE INITIAL STAGES. THE DEPARTMENT OF CORRECTIONS AND THE LEXINGTON COUNTY DETENTION CENTER ARE PROFESSIONALS WHO MAKE SURE THAT FOLKS DON'T GET OUT OF THOSE PLACES ONCE THEY GET IN.

Q THEY ARE THERE TO KEEP PEOPLE IN?

A THAT'S WHY THEY ARE THERE. THEY DON'T CARE WHAT SOMEONE IS IN FOR. THEY ARE THERE TO MAKE SURE THAT EVERYBODY WHO HAS A PRISON SENTENCE SERVES IT BEHIND – BEHIND FENCES, BARBWIRE AND GUN TOWERS.

Q OKAY. NOW, IN ARRIVING AT YOUR CONCLUSIONS, DID YOU TAKE INTO CONSIDERATION THAT SOME INMATES CLAIM THAT HE TALKED ABOUT MAYBE TAKING A FEMALE GUARD HOSTAGE AND DOING THINGS OF THAT NATURE?

A YES, I DID. AGAIN, I HEARD A LOT OF – THERE WAS A LOT OF TALK AND NO BEHAVIOR. I SAW – YOU KNOW, I HEARD ABOUT A LOT OF PUFFING, OF DRAWING – DRAWING SCARY PICTURES –

[1924] Q WHAT KIND OF SCARY PICTURES?

A I HEARD ABOUT DRAWING PICTURES OF CHICKENS WITH THEIR HEADS CUT OFF AND TALKING ABOUT VIOLENT FANTASIES AND TALKING ABOUT TAKING HOSTAGES TO ESCAPE, BUT SOME OF THAT – IN TALKING TO HIM, SOME OF THAT WAS AS A RESULT OF OLDER INMATES TRYING TO SEE IF THEY COULD GET HIM STIRRED UP AND SOME OF IT WAS BIG TALK, JUST BIG TALK BY A GUY WHO WAS SMALLER THAN THE OTHER FELLOWS AND SCARED OF THE OTHER PEOPLE THAT HE WAS IN JAIL WITH. AND QUITE FRANKLY, VERY SCARED ABOUT GOING TO PRISON BECAUSE OF THE DANGERS THERE.

Q ARE PRISONS A VERY SAFE PLACE FOR A KID LIKE THIS?

A NO, THEY ARE NOT.

Q OKAY.

A BUT AGAIN, THAT'S WHAT CORRECTIONAL STAFF ARE THERE FOR. THEY ARE THERE TO MAKE SURE THAT PEOPLE ARE THERE, THAT THEY MINIMIZE ANY PROBLEMS AND THEY MAKE SURE PEOPLE STAY. THEY ARE QUITE GOOD AT THEIR JOBS. THEY REALLY ARE.

Q DR. SHEA, BASED UPON YOUR WORK IN THIS CASE AND YOUR PROFESSIONAL, EDUCATION AND EXPERIENCE, DO YOU HAVE AN OPINION ABOUT HOW BILLY WOULD MAKE AN OVERALL ADJUSTMENT TO PRISON?

A WELL, HE'S RELATIVELY INTELLIGENT. HE'S OF AVERAGE INTELLIGENCE. HE HAS GOOD FAMILY SUPPORT AND INMATES WHO HAVE GOOD FAMILY

SUPPORT TEND TO DO BETTER WHILE THEY ARE IN THERE. HE HAD A RELATIVELY GOOD ADJUSTMENT TO JAIL. [1925] THEY NEVER HAD TO LOCK HIM UP FOR ANY EXTENDED PERIODS OF TIME. THEY NEVER HAD TO REFER HIM FOR SAFEKEEPERS' STATUS. THERE WAS NO FIGHTING –

Q WHAT DO YOU MEAN BY SAFEKEEPERS' STATUS –

A WELL, THEY NEVER HAD – WHEN INMATES ARE PARTICULARLY DANGEROUS, THEY WILL SEND THEM OUT OF THE JAILS TO PRISON EVEN BEFORE THEIR TRIAL BECAUSE THEY ARE TOO DANGEROUS FOR JAIL. THAT WAS NEVER A QUESTION FOR SOMEBODY LIKE MR. KELLY.

HE TALKED TO COUNSELORS WHEN HE WAS UPSET OR DISTRESSED. WHAT I DIDN'T SEE IN THE RECORD WAS AS IMPORTANT AS WHAT I DID. YOU KNOW, THERE WAS AGAIN, NO SUICIDAL THREATS, NO MENTAL ILLNESS, NO VIOLENCE, NO GANG ACTIVITY, YOU KNOW.

I WAS ABLE TO WORK WITH HIM WITH HIS HANDS – HIS HANDS WERE NOT IN RESTRAINTS WHEN I WORKED WITH HIM AND HE DIDN'T POSE ANY THREATS TO ME. HE DIDN'T MAKE ME UNDULY NERVOUS. HE DIDN'T TRY TO – ONE OF THE THINGS I WATCH FOR IS WHEN I'M EVALUATING PEOPLE, SOMETIMES THEY WILL TRY TO STEAL MY EQUIPMENT. THEY WILL TRY TO STEAL PENCILS. THEY WILL TRY TO STEAL PENS. AND HE NEVER TRIED ANY – ANYTHING LIKE THAT.

I DON'T SEE ANYTHING THAT WOULD MAKE ME FEEL LIKE THE DEPARTMENT OF CORRECTIONS COULD NOT CONTAIN HIM. MY EXPERIENCE IS SUCH THAT THE DEPARTMENT OF CORRECTIONS [1926] HANDLES FAR, FAR WORSE THAN MR. KELLY EVERYDAY AND VERY WELL.

Q BASED UPON YOUR WORK IN THIS CASE AND YOUR PROFESSIONAL TRAINING AND EXPERIENCE, IS IT PROBABLE THAT BILLY WOULD BE A THREAT EITHER TO OTHER INMATES OR TO GUARDS IN A PRISON POPULATION?

A ANYTHING IS POSSIBLE, BUT WE HAVE NOTHING TO SUGGEST THAT. IF ANYTHING, I WOULD SAY THAT THE OTHER INMATES WOULD BE MORE OF A THREAT TO HIM.

Q THANK YOU, DR. SHEA.

PLEASE ANSWER ANY QUESTIONS THE PROSECUTION MAY HAVE.

MR. CHASE: MAY IT PLEASE COURT?

THE COURT: YES, SIR.

[1926] DR. STEVEN SHEA – CROSS BY MR CHASE

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CROSS-EXAMINATION

BY MR. CHASE:

Q HI, MR. SHEA.

MY NAME IS TOM CHASE. JUST A FEW QUESTIONS. I JUST WANT TO COVER A COUPLE AREAS WITH YOU.

IN YOUR REPORT AND FROM YOUR TESTIMONY, I THINK IT'S PRETTY CLEAR THAT YOU ARE SAYING WILLIAM ARTHUR KELLY DOESN'T HAVE ANY SORT OF A MENTAL ILLNESS? I COULD NOT FIND THAT HE HAD ANY MENTAL ILLNESS. NO MENTAL ILLNESS THAT WOULD AFFECT HIS THINKING TO WHERE HE COULDN'T CONTROL WHAT HE WAS DOING?

[1927] A NO.

Q NO MENTAL ILLNESS THAT WOULD CAUSE HIS THINKING TO BE ABSTRACT OR DIFFERENT THAN A NORMAL PERSON'S?

A THERE'S NO INDICATION OF THAT.

Q IN OTHER WORDS, IF HE'S THINKING SOMETHING, IT'S THROUGH THE NORMAL PROCESS AND THERE'S NOTHING AFFECTING HIM?

A THAT'S –

Q – NOTHING THAT WOULD BE CONSIDERED A MENTAL ILLNESS?

A THAT'S CORRECT.

Q NOW, IN YOUR REVIEW OF THE RECORDS, YOU OBVIOUSLY LOOKED AT ALL OF THE MENTAL HEALTH RECORDS. THOSE WERE ALL PROVIDED TO YOU?

A YES.

Q SO THERE WOULDN'T HAVE BEEN ANY SORT OF MENTAL ILLNESS WHEN HE TOLD THE MENTAL HEALTH COUNSELOR THAT ANGER JUST HAPPENS TO HIM?

A THAT'S NOT AN INDICATION OF MENTAL ILLNESS, NO. NOT NECESSARILY.

Q AND IT CERTAINLY WASN'T A MENTAL ILLNESS THAT CAUSED HIM TO TELL THE MENTAL HEALTH COUNSELOR THAT HE OBSESSES AT TIMES ABOUT KILLING PEOPLE WHO PISSED HIM OFF AND THAT HE THINKS ABOUT HOW HE COULD DO IT AND NOT GET CAUGHT?

A THAT WOULD NOT BE AN INDICATION OF MENTAL ILLNESS, NO.

[1928] Q AND FROM THE RECORDS YOU REVIEWED, MR. KELLY DID TELL THAT TO MENTAL HEALTH COUNSELORS?

A I SAW THOSE RECORDS, YES, SIR.

Q AND THE FACT THAT MR. KELLY HAS VIOLENT FANTASIES, THAT'S NOT CAUSED BY MENTAL ILLNESS?

A NO, IT'S NOT.

Q THAT'S JUST WILLIAM ARTHUR KELLY?

A IT IS. THE – IT'S SOMETHING YOU SEE A LOT WITH PEOPLE WHO HAVE DONE SOMETHING VIOLENT. ESPECIALLY WHEN THEY DON'T HAVE A LONG HISTORY OF VIOLENCE. THEY ARE TRYING TO FIGURE OUT HOW COULD THEY HAVE DONE SUCH A THING, YOU KNOW, WHY – WHY DID I DO THIS. SOMETIMES WHAT THEY'VE DONE ACTUALLY SCARES THEM AND THEY FEEL THE NEED TO TALK ABOUT EVERY – EVERY IMPULSE, EVERY THOUGHT, EVERY SCARY THING TO MAKE SURE IT DOESN'T HAPPEN ANYMORE.

Q DR. SHEA, WHERE IN THE RECORDS THAT YOU REVIEWED DID YOU SEE EVIDENCE THAT WHAT HE HAD DONE TO SHIRLEY SHEALY HAD SCARED HIM?

A I GOT THAT FROM TALKING TO HIM.

Q FROM HIM?

A FROM HIM.

Q WHAT DID HE SAY ABOUT BEING SCARED ABOUT WHAT HE HAD DONE TO SHIRLEY SHEALY?

A HE GOT FAIRLY EMOTIONAL AND TALKED ABOUT HE COULDN'T BELIEVE HE COULD DO SUCH A THING.

[1929] Q COULDN'T BELIEVE THAT HE COULD DO THAT TO SHIRLEY SHEALY?

A RIGHT.

Q DID HE EXPRESS HOW HE FELT ABOUT WHAT HE HAD DONE?

A HE EXPRESSED THAT HE FELT SORRY FOR HAVING DONE IT. HE EXPRESSED FEELING SORRY FOR MS. SHEALY'S HUSBAND AND THE PAIN THAT HE WOULD HAVE CAUSED HER FAMILY AND THE MOST – THE MOST EMOTION I SAW IS HE – HE WAS VERY UPSET ABOUT HOW THIS HAD AFFECTED HIS MOTHER.

Q AND WHEN DID HE TELL YOU THAT?

A WHEN I SPOKE TO HIM AT THE JAIL.

Q AND WHEN WAS THAT?

A THAT WAS ON THE – SOMEWHERE BETWEEN THE 8TH AND 11TH OF AUGUST.

Q AND WHEN, ACCORDING TO YOUR SUBPOENA, OR IF YOU CAN SAY, DID THIS TRIAL BEGIN?

A MONDAY.

Q MONDAY OF THIS WEEK?

A THIS WEEK, CORRECT.

Q BEG THE COURT'S INDULGENCE JUST ONE SECOND, YOUR HONOR.

THE COURT: YES, SIR.

MR. CHASE: THANK YOU, YOUR HONOR.

NOW, YOU BASED ALL OF YOUR CONCLUSIONS ABOUT HIM BEING SCARED ON WHAT HE TOLD YOU AT THAT POINT?

[1930] THE WITNESS: SOME WAS ON WHAT HE TOLD ME. SOME WAS ON MY EXPERIENCE WITH YOUNGER, SMALLER INMATES. IN SOME WAYS, HE MINIMIZES HIS FEAR. HE DOESN'T LIKE TO TALK ABOUT IT, BUT MY OPINIONS ARE BASED, NOT JUST ON WHAT HE SAID, BUT ALSO ON WHAT HE DID AND WHAT I READ IN THE RECORDS.

Q DID YOU IGNORE THE FACT THAT THE MENTAL HEALTH COUNSELORS THAT HAD TALKED WITH HIM THROUGHOUT HIS STAY AT THE LEXINGTON COUNTY DETENTION CENTER DISCUSSED THINGS LIKE HE NEVER REALLY HAS ANY REMORSE FOR HIS CRIME –

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[1940] THE COURT: ALL RIGHT. LET'S BRING THE JURY BACK.

(JURY IN.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU WENT TO THE JURY ROOM, THERE WAS A QUESTION POSED BY THE STATE AND I INSTRUCT YOU AT THIS TIME THAT YOU ARE TO DISREGARD THAT QUESTION AND YOU ARE NOT TO CONSIDER IT IN ANY FASHION WHATSOEVER IN YOUR DELIBERATIONS [1941] WHEN YOU DO BEGIN YOUR DELIBERATIONS AND THAT IT IS TO BE STRICKEN FROM THE RECORD.

ALL RIGHT, MR. CHASE.

MR. CHASE: THANK YOU, YOUR HONOR.

CONTINUED CROSS-EXAMINATION

BY MR. CHASE:

Q DR. SHEA, JUST ONE QUESTION. SOME OF THE QUESTIONS THAT I WAS ASKING YOU ABOUT, THE STATEMENTS THAT HE WAS MAKING WHILE HE WAS IN JAIL ABOUT THE VIOLENCE, ABOUT HIS VIOLENT FANTASIES, ABOUT THINKING OF WAYS TO KILL PEOPLE AND NOT GET CAUGHT, NONE OF THAT WAS DUE TO A MENTAL ILLNESS?

A THAT WAS NOT DUE TO A MENTAL ILLNESS, NO.

Q SO THAT'S JUST THE WAY WILLIAM KELLY IS?

A THERE ARE A LOT OF REASONS TO SAY THAT, BUT IT'S NOT DUE TO A MENTAL ILLNESS.

Q ONE OF THEM COULD BE THAT HE'S JUST MEAN?

A THAT COULD BE.

Q AND SINCE THERE'S NO MENTAL ILLNESS THAT WOULD HAVE CAUSED HIM TO DO WHAT HE DID TO SHIRLEY SHEALY ON JANUARY THE 5TH OF 1996, IT COULD HAVE BEEN BECAUSE HE'S JUST DOWN RIGHT MEAN?

A THAT COULD BE. BUT THERE ARE A LOT OF MEAN PEOPLE IN THE JAILS AND IN THE PRISONS IF THAT'S SO.

Q AND HE WOULD BE ONE OF THEM ONCE HE GOT THERE, RIGHT?

[1942] A HE WOULD BE THERE.

Q SO HE WOULD FIT RIGHT IN?

A I THINK THEY – I DON'T THINK THEY HAVE ANY TROUBLE CONTAINING HIM.

Q AND HE WOULDN'T HAVE ANY PROBLEM HANDLING HIMSELF?

A I'M NOT SURE HOW MUCH TROUBLE HE WOULD HAVE HANDLING HIMSELF.

Q WELL, LET'S GO INTO THAT. YOU DESCRIBED – YOU OBVIOUSLY HAVE EXTENSIVE EXPERIENCE IN THE OPERATIONS OF JAILS AND HOW INMATES HANDLE THEMSELVES IN JAILS AND HOW THEY CAN ADAPT TO IT. I BELIEVE THAT'S WHAT YOU WERE QUALIFIED TO GIVE AN OPINION IN?

A YES.

Q AND YOU'D HAVE TO AGREE WITH ME, WOULDN'T YOU, THAT A SHANK IS PROBABLY THE BEST WAY TO PROTECT YOURSELF IN A JAIL, ISN'T IT?

A ACTUALLY, QUICK WITS ARE BEST WAY TO PROTECT YOURSELF IN A JAIL.

Q SO YOU'RE DENYING THAT A SHANK WOULD BE A GOOD WAY TO PROTECT YOURSELF?

A IT DEPENDS ON HOW GOOD A SHANK, HOW GOOD YOU ARE AT USING IT, HOW GOOD YOU ARE AT FIGHTING. MY EXPERIENCE IS THAT BEING ABLE TO TALK YOURSELF OUT OF A SITUATION IS THE BEST WAY TO ADJUST AND GET ALONG IN JAIL. AND THE PEOPLE WHO DO BEST THERE ARE THE ONES WHO ARE ABLE TO DO THAT.

[1943] Q AND THE ONES WHO CAN PROTECT THEMSELVES ARE GOING TO DO THE BEST, RIGHT?

A IF NECESSARY.

Q AND THE ONES WHO CAN SHOW THAT THEY ARE TOUGH ARE THE ONES WHO ARE GOING TO DO WELL, RIGHT?

A OR AT LEAST SHOW THEMSELVES NOT TO BE EASY TARGETS.

Q AND THEY ARE THE ONES WHO ARE GOING TO RULE THE ROOST, RIGHT? THEY ARE GOING TO BE ROOSTERS?

A THE TOUGHER GUYS TEND TO RULE THE ROOST, BUT I DON'T SEE MR. KELLY AS RULING A WHOLE LOT. HE'S NOT THE SORT OF PERSON THAT WILL BE A LEADER IN A PRISON, ANYMORE THAN HE WAS A LEADER IN THE JAIL.

Q WELL, LET'S TALK ABOUT THE SHANK AND YOUR OPINION ON THE USE AND VERSUS SHOWING. YOU DESCRIBED TO THE JURY THAT WHEN YOU HAVE A SHANK, THAT THERE BASICALLY WOULD BE TWO WAYS THAT YOU COULD USE THAT, RIGHT? ONE WOULD BE TO ACTUALLY USE IT TO PROTECT YOURSELF OR ENFORCE?

A UH-HUH.

Q AND THE OTHER WOULD BE TO JUST KIND OF WAVE IT AROUND AND SHOW, LOOK HOW TOUGH I AM?

A THOSE ARE TWO WAYS, RIGHT.

Q OKAY. WHAT EVIDENCE DID YOU CONSIDER THAT SHOWED THAT THAT'S – THAT WILLIAM ARTHUR KELLY WALKED AROUND ON THE FLOORS AT THE DETENTION CENTER TO EACH ONE OF THOSE INMATES GOING, LOOK HERE, I'VE GOT THIS; I'VE GOT THIS? [1944] WHAT EVIDENCE DID YOU CONSIDER?

A THE EVIDENCE I CONSIDERED WERE THE INCIDENT REPORTS AND MY CONVERSATION WITH MR. KELLY –

Q MR. KELLY –

A – AND MY UNDERSTANDING THAT HE MADE THE KNIFE IN FRONT OF OTHER PEOPLE.

Q WHO DID HE MAKE IT IN FRONT OF?

A MY UNDERSTANDING WAS HE MADE IT IN FRONT OF THE OTHER PEOPLE WHO WERE IN THE CELL WITH HIM.

Q WHO DID HE SAY HE SHOWED IT TO?

A HE SAID HE MADE IT IN FRONT OF EVERYBODY AND JUST HAD IT OUT.

Q IN FRONT – AND THAT'S ALL I'M ASKING IS WHO WOULD IT HAVE BEEN?

A HE DIDN'T GIVE ME ANY INDIVIDUAL NAMES.

Q SO YOU DIDN'T TALK TO ANYBODY WHO HE SAID HE SHOWED THIS TO?

A NO. I LOOKED AT THE INCIDENT REPORT THAT INDICATED THAT ANOTHER INMATE

REPORTED TO AN OFFICER THAT HE HAD A HOME-MADE KNIFE.

Q IN FACT, THE INCIDENT REPORT THAT YOU ARE REFERRING TO, ALL THAT SHOWED WAS THAT HE HAD IT ON HIS PERSON ACTUALLY CONCEALED, RIGHT?

A CORRECT.

Q SO WHAT ARE YOU CONSIDERING THAT SHOWS HE'S BEEN [1945] SHOWING IT TO PEOPLE? HOW DOES THAT PROVE TO YOU, AS AN EXPERT, THAT HE'S GOING AROUND USING THAT JUST TO SHOW HE'S TOUGH?

A I NEVER MEANT TO IMPLY THAT HE WAS WALKING AROUND FROM PERSON TO PERSON SAYING I'VE GOT A KNIFE. HE MADE IT IN FRONT OF, AT LEAST, ONE OTHER PERSON SO THAT PEOPLE WOULD SEE THAT HE WAS MAKING IT.

Q OKAY. DID YOU CONSIDER THE EVIDENCE THAT HE HAD ACTUALLY USED THAT AND HAD IT HIDDEN WHEN MS. PRICE CAME INTO THE ROOM – INTO HIS CELL THAT ONE AFTERNOON – THAT ONE EVENING? DID YOU CONSIDER THAT EVIDENCE?

A I DON'T RECALL THAT PARTICULAR EVENT, NO.

Q OKAY. SO YOU NEVER GOT THE INFORMATION FROM MR. KELLY ABOUT WHEN HE STOOD BEHIND THE DOOR OF HIS CELL AND TRIED TO LURE HER IN THERE AND HAD A SHANK RIGHT BACK BY HIS SIDE WHICH HE WAS GOING TO USE

TO TAKE HER HOSTAGE? YOU DIDN'T HAVE THAT INFORMATION AVAILABLE TO YOU?

A I NEVER GOT ANY INFORMATION ABOUT THAT, NO.

Q DR. SHEA, WOULD YOU AGREE WITH ME THAT THAT'S NOT JUST SHOWING TO OTHER INMATES TO SHOW YOU ARE TOUGH?

A I DON'T – I DON'T KNOW THE SITUATION. IF HE WAS STANDING THERE WITH A KNIFE BEHIND SOMEBODY, THAT'S – THAT'S SERIOUS, BUT I JUST DON'T HAVE ANY INFORMATION ABOUT THAT.

Q AND I'M – I'M NOT ASKING YOU WHETHER IT HAPPENED. [1946] I'M ASKING YOU IF YOU WERE PRESENTED WITH THOSE FACTS, WOULD YOU CONSIDER THAT TO BE THE OPPOSITE OF SHOWING? THAT'S ACTUALLY THREATENING TO USED AND ACTUALLY ACTIVELY BEING INVOLVED IN USING IT?

A AGAIN, I DON'T KNOW WHAT THE SITUATION WAS. IF IT WAS A SITUATION WHERE THERE WERE A LOT OF BIG THREATS AND NO ACTION, THAT'S – THAT FITS IN WITH THE PATTERN I WAS TALKING ABOUT. I –

Q NOW –

A – I SAID BEFORE, THE SHANK IS PROBABLY THE THING THAT GIVES ME THE MOST CONCERN AND THESE ARE, YOU KNOW, RELATIVELY COMMON. YOU HEAR ABOUT THEM, YOU SEE THEM, YOU TAKE THEM AWAY. THE OFFICERS DO A PRETTY GOOD JOB OF FINDING THEM. AND IT'S PRETTY

CONSTANT, A PRETTY CONSTANT OPERATION FOR THE JAILS AND THE PRISONS TO MAKE SURE THAT INMATES DON'T HARM THEMSELVES –

Q DOCTOR –

A – THEY ARE PRETTY GOOD AT IT.

Q – I APOLOGIZE. I DIDN'T MEAN TO TALK WHEN YOU WERE FINISHING YOUR ANSWER.

WHO DO YOU THINK WOULD BE A BETTER SOURCE TO FIND OUT ABOUT THE NUMBER OF SHANKS IN A PRISON, THE GUARDS OR THE INMATES?

A I THINK THEY BOTH HAVE A PRETTY GOOD IDEA HOW MANY SHANKS ARE IN THE PRISON.

[1947] Q DR. SHEA, ARE YOU TELLING ME THAT AS TO THE ACTUAL NUMBER OF SHANKS THAT ARE BEING CARRIED AROUND IN A JAIL, THE PEOPLE WHO THEY ARE BEING HIDDEN FROM ARE A BETTER SOURCE OF KNOWING HOW MANY ARE IN THERE AND HOW MANY ARE AVAILABLE AND WHO IS CARRYING THEM THAN THE INMATES WHO ARE SUPPOSEDLY BEING INTIMIDATED BY THEM OR PLANNING TO USE THEM OR MAKING THEM OR CARRYING THEM? WHO WOULD BE A BETTER SOURCE?

A IF THOSE KNIVES WERE BEING HIDDEN, THEN THE OTHER INMATES WOULDN'T KNOW ABOUT THEM ANYMORE THAN THE OFFICERS WOULD. I THINK THAT THE OFFICERS ARE REALISTIC ABOUT THE NUMBER OF SHANKS IN THE JAILS. THEY KNOW THAT THEY ARE THERE. THEY KNOW

TO LOOK FOR THEM. THEY KNOW TO BE CAREFUL OF THEM.

I THINK THE OTHER INMATES MAY HAVE MORE INFORMATION ABOUT WHERE INDIVIDUAL SHANKS ARE BECAUSE IF THE OFFICERS KNEW, THEY WOULD GO IN AND TAKE THEM, BUT I THINK THAT THE OFFICERS ARE NOT NAIVE ABOUT THE PRESENCE OR ABSENCE OF KNIVES IN JAILS OR IN PRISONS.

Q WE BOTH CAN AGREE THAT THERE ARE A LOT OF SHANKS IN JAIL?

A YES.

Q AND YOU WOULD AGREE WITH ME THAT IF SOMEONE IS CONTINUING TO MAKE THEM, JUST THE FACT THAT THERE IS ONLY EVIDENCE OF ONE GUARD REPORT OF HAVING FOUND THEM CERTAINLY [1948] DOESN'T SHOW THAT THEY HAVEN'T HAD THEM ON OTHER OCCASIONS?

A THAT'S CORRECT.

Q AND, IN FACT, IF THERE WAS EVIDENCE FROM AN INMATE WHO WAS IN A CELL WITH A PERSON WHO WAS MAKING SHANKS ON A REGULAR BASIS, WOULDN'T THAT BE GOOD EVIDENCE THAT THERE WERE ADDITIONAL SHANKS?

A YES.

Q NOW, YOU ALSO TALKED ABOUT BEING INVOLVED IN GANGS. WHAT DO YOU USE AS EVIDENCE THAT A PERSON MAY BE IN A GANG? WHAT

DO YOU USE AS AN EXPERT IN PRISON LIFE, WHAT DO YOU USE?

A I USE REPORTS FROM CORRECTIONAL STAFF. I USE WHETHER OR NOT SOMEONE IS WEARING SOMETHING THAT IDENTIFIES HIM ASS [sic] A MEMBER OF A GANG OR A CLUB. I –

Q AND WHAT –

A – I RELY ON PEOPLE'S DESCRIPTION OF THEIR AFFILIATIONS.

Q WHAT WOULD IDENTIFY A PERSON WITH A GANG?

A WHETHER OR NOT THEY WERE WEARING SOMETHING THAT HAD THEM AS PART OF A GANG.

Q WHICH WOULD BE?

A A – IN JAILS AND PRISONS, IT'S USUALLY WRITING THE GANG'S NAME OR AFFILIATION ON THE T-SHIRT OR JUMPSUIT USUALLY WITH A PEN.

Q THEY JUST PUT IT ON THEIR CLOTHING –

A [1949] ACTUALLY THEY DO. SOMETIMES THEY TATTOO IT ON, BUT TYPICALLY, IN JAILS, THEY USUALLY WRITE IT ON THEIR CLOTHES.

Q SO YOU WOULD AGREE WITH ME THAT THEY WILL FREQUENTLY MAKE MARKS EITHER ON THEIR CLOTHING OR PERMANENTLY IN THEIR SKIN TO SHOW THEIR AFFILIATIONS WITH GANGS?

A VERY OFTEN, YES, SIR.

Q AND A LOT OF TIMES, THAT'S JUST SYMBOLS, ISN'T IT? TATTOOS OR MARKINGS ON THE UNIFORMS?

A THEY COULD BE, YES.

Q DID YOU ASK WILLIAM ARTHUR KELLY WHETHER HE HAS ANY TATTOOS?

A I TYPICALLY DO. I DON'T REMEMBER WHETHER I DID OR NOT. I'M NOT AWARE THAT HE HAD ANY.

Q YOU DIDN'T CHECK TO WHETHER HE HAD ANY?

A NO, I DIDN'T.

Q DID YOU SEE THESE ON WILLIAM ARTHUR KELLY?

A NO, I DID NOT.

Q IS THAT WILLIAM ARTHUR KELLY?

A YES, IT IS.

Q YOUR HONOR, AT THIS TIME, WE WOULD MOVE THESE TWO PHOTOGRAPHS INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MS. FULLWOOD: SIDE BAR.

(WHEREUPON, A BENCH CONFERENCE WAS [1950] HELD AT THIS TIME OFF THE RECORD.)

MR. CHASE: YOUR HONOR, AT THIS TIME, WE WOULD MOVE THESE PHOTOGRAPHS INTO EVIDENCE.

MS. FULLWOOD: NO OBJECTION.

THE COURT: WITHOUT OBJECTION, THEY WILL BE ADMITTED AS STATE'S NUMBER 124 AND 125.

(WHEREUPON, STATE'S EXHIBIT NUMBERS 124 AND 125, PHOTOGRAPHS, ENTERED INTO EVIDENCE AT THIS TIME WITHOUT OBJECTION.)

MR. CHASE: DR. SHEA, YOU ALSO DISCUSSED THE PROBLEMS THAT YOU WOULD EXPECT FROM WILLIAM ARTHUR KELLY WOULD HE BE PLACED INTO THE PENAL SYSTEM IN SOUTH CAROLINA –

THE WITNESS: YES.

Q – CORRECT? AND YOU DISCUSSED THE FACT THAT THERE'S KIND OF TWO DIFFERENT WAYS THAT INMATES WILL APPROACH ESCAPES. ONE WOULD BE THEY WILL TALK ABOUT IT, IS THAT RIGHT?

A THAT'S RIGHT.

Q AND THEY ALL TALK ABOUT IT. I THINK WE CAN AGREE ON THAT POINT?

A MOST OF THE INMATES I HAVE EVER MET EITHER TALK ABOUT IT OR ADMITTED HAVING TALKED ABOUT IT.

Q FROM YOUR EXPERIENCE?

A YES.

[1951] Q AND THEN THERE'S THE SECOND SIDE OF ACTUALLY TAKING ACTION TO ESCAPE?

A CORRECT.

Q YOU WOULD AGREE THAT THERE IS BIG DIFFERENCE BETWEEN THE TWO?

A THERE IS, YES.

Q IN FACT, IF THEY ARE JUST TALKING ABOUT IT, THAT'S NORMAL. THAT'S PRETTY NORMAL. I MEAN, YOU'RE AN INMATE THAT YOU ARE NOT GOING TO WORRY ABOUT TOO MUCH. IF THEY DID THAT, YOU ARE NOT GOING TO HAVE A WHOLE LOT OF CONCERN?

A WELL, I – DEPENDED ON WHAT THEY WERE TALKING ABOUT. I MIGHT HAVE A CONCERN.

Q WHEN IT'S JUST TALK, YOU ARE NOT THAT CONCERNED ABOUT IT, RIGHT?

A WELL –

Q LET ME ASK YOU THIS AND THIS – WELL, YOU CAN ANSWER THE QUESTION. I'M SORRY, I DIDN'T MEAN TO INTERRUPT YOU.

A HAVING – HAVING WORKED IN PLACES WHERE PEOPLE ARE LOCKED UP, I'M CONCERNED WHENEVER ANYBODY TALKS ABOUT ESCAPE. IT'S NOT UNCOMMON. IT DOESN'T NECESSARILY MEAN THAT THEY ARE PLANNING IT, THAT THEY ARE GOING TO BE WELL-ORGANIZED ENOUGH TO ACTUALLY BE ABLE TO DO IT, BUT YOU ALWAYS STAY ON GUARD FOR THAT. YOU ALWAYS STAY COGNIZANT THAT IS A POSSIBILITY. YOU ALWAYS MAKE SURE THAT THAT'S ONE OF THE THINGS YOU

ARE CONSIDERING WHENEVER YOU ARE [1952] DEALING WITH ANY OF THESE FELLOWS.

Q SO EVEN TALK ABOUT ESCAPE IS SERIOUS. I DIDN'T MEAN TO MINIMIZE IT.

A OKAY.

Q SO EVEN TALK ABOUT IT IS VERY SERIOUS?

A RIGHT.

Q SO YOU WOULD AGREE THAT IF THERE'S TALK ABOUT IT, FOLLOWED BY ACTION, WE ARE INTO A WHOLE NEW AREA, AREN'T WE?

A IT WOULD DEPEND ON THE ACTION, BUT YES, IT WOULD BE IN A NEW AREA.

Q AND YOUR OPINION ABOUT SOMEONE WHO MERELY TALKS ABOUT IT WOULD NOT BE THE SAME AS FAR AS THEIR ADAPTABILITY COMPARED TO SOMEONE WHO TALKS ABOUT IT AND TAKES ACTION ON IT?

A IT DEPENDS ON WHAT THE ACTIONS WERE.

Q OKAY. WOULD YOU AGREE WITH ME THAT TALKING ABOUT TAKING A CORRECTIONAL OFFICER HOSTAGE IS SERIOUS?

A VERY SERIOUS.

Q WOULD YOU AGREE WITH ME THAT ACTUALLY TAKING STEPS TO DO THAT IS BEYOND VERY SERIOUS?

A AGAIN, IT WOULD DEPEND ON WHAT STEPS, BUT IF THERE WERE STEPS TAKEN, THAT WOULD BE VERY SERIOUS, YES.

Q IN FACT, IF AN INMATE WERE STANDING WHO - STANDING BEHIND ONE OF THEIR CELL DOORS PURPOSEFULLY LURING A FEMALE [1953] CORRECTIONAL OFFICER WHO THEY HAD PICKED OUT BECAUSE OF HER - BASICALLY BECAUSE THE PERSON IS A PUSHOVER AND THEY KNOW THAT THEY COULD TAKE ADVANTAGE OF HER, STANDING WITH A SHANK LURING HER INTO THE CELL, LITERALLY GETTING TO THE POINT WHERE THE DOOR IS OPEN AND HAVING A SHANK IN HIS HAND READY TO TAKE THAT PERSON HOSTAGE, THAT'S PRETTY SERIOUS, ISN'T IT?

A I WOULD SAY THAT'S SERIOUS, YES, SIR.

Q AND YOU CERTAINLY WOULD CONSIDER THE FACT THAT THAT HAD HAPPENED ON A PRIOR OCCASION WHEN YOU ASSESS EVIDENCE THAT WOULD BE IN A CELL WHERE AN INMATE IS INVOLVED IN A BLOCK BEING - TRYING TO BE TAKEN OUT OF THE WALL?

A THAT ALSO - THAT'S SEPARATE, BUT I WOULD TAKE IT INTO CONSIDERATION ALSO.

Q IN ASSESSING THE ADAPTABILITY OF A PERSON WHO IS -

A YES.

Q - GOING TO GO INTO THE PRISON SYSTEM?

A RIGHT.

Q YOU ARE GOING TO TAKE ALL OF THAT INTO CONSIDERATION?

A YES, I AM.

Q AND WHEN YOU ARE ASSESSING WHETHER THEY ARE GOING TO BE AN ESCAPE RISK, YOU ARE CERTAINLY GOING TO TAKE INTO CONSIDERATION ANY PAST EVENTS, INCLUDING TALKING OR ACTIONS THAT SHOW A POTENTIAL, RIGHT?

A CORRECT.

[1954] Q YOU WOULD AGREE WITH ME THAT ACTUALLY DIGGING OUT AROUND THE MORTAR OF A CINDER BLOCK ON AN EXTERIOR WALL OF THE BUILDING AT THE JAIL IS AN ATTEMPT TO ESCAPE, WOULDN'T YOU?

A I ACTUALLY HAD PEOPLE DOING THAT ALL THE TIME WHEN I WAS WORKING AT KIRKLAND. NOT ALL OF THEM WERE TRYING TO ESCAPE. IN FACT, I WASN'T AWARE THAT ANY OF THEM WERE DOING THAT TRYING TO ESCAPE –

Q IS IT ART –

A I DON'T KNOW IF IT WAS AN ESCAPE ATTEMPT OR NOT. I KNOW THAT INMATES SIT THERE AND THEY DIG OUT THAT MORTAR ALL THE TIME. THEY ARE VERY WELL DESTRUCTIVE TO THE CELLS ALL THE TIME. I DON'T KNOW WHETHER OR NOT –

Q SO –

A – I DON'T KNOW WHETHER OR NOT TAKING MORTAR AROUND ONE CINDER BLOCK REALLY CONSTITUTES AN ESCAPE ATTEMPT OR NOT.

Q IS IT YOUR OPINION THAT THAT'S JUST DONE OUT OF BOREDOM? ARE YOU SAYING THAT THAT COULDN'T BE AN ESCAPE RISK?

A NO, I'M NOT.

Q OR AN ESCAPE ATTEMPT?

A I'M NOT SAYING IT COULD NOT BE.

Q ARE YOU SAYING IT'S ART WORK?

A I'M SAYING IT'S RANDOM DESTRUCTION. IT'S BOREDOM. [1955] IT COULD BE AN ESCAPE RISK OR AN ESCAPE ATTEMPT. FREQUENTLY, IT'S JUST, YOU KNOW, SOMETHING THESE GUYS DO. A LOT OF TIMES THEY CHISEL OFF THE MORTAR BETWEEN BLOCKS ON INTERIOR WALLS BETWEEN THE CELLS.

Q SO IN THIS CASE, YOU'RE SAYING ON AN EXTERIOR WALL WHERE THE MORTAR WAS REMOVED SIX OUT OF THE NINE INCHES THAT THAT WALL ACTUALLY ENCOMPASSED WASN'T AN ESCAPE ATTEMPT? THAT IT WAS DONE OUT OF BOREDOM?

A I DON'T KNOW THE PARTICULARS OF THAT INCIDENT. I KNOW THAT THAT WAS FOUND IN A ROOM WHERE MR. KELLY AND A NUMBER OF OTHER PEOPLE WERE. I DON'T KNOW THE PARTICULARS ABOUT IT. WHEN I ASKED HIM, HE SAID IT WAS LIKE THAT WHEN HE MOVED IN. I – YOU KNOW, I DON'T KNOW THE PARTICULARS. I –

Q THE PROBLEM – I'M SORRY.

A – I JUST DON'T KNOW.

Q DID YOU FOLLOW-UP ON THAT, WHETHER IT WAS LIKE THAT WHEN HE MOVED IN THERE?

A MY UNDERSTANDING IS THAT – AND I DIDN'T GET THIS FROM MR. KELLY – I GOT THIS FROM CONVERSATIONS WITH HIS ATTORNEY THAT THERE WAS INDICATION FROM OTHER PEOPLE THAT IT WAS LIKE THAT. THAT THE OTHER PEOPLE WHO WERE IN THAT ROOM SAID THAT AND THAT INMATES WHO WERE IN THAT ROOM BEFORE, BEFORE MR. KELLY EVER GOT THERE, SAID IT WAS LIKE THAT. BUT I HAVE NO DIRECT KNOWLEDGE. I GOT THAT THROUGH [1956] HIS ATTORNEY.

Q INMATES – I'M SORRY, COULD YOU – DID YOU SAY THAT THERE WERE INMATES THAT WERE IN THE ROOM BEFORE WILLIAM ARTHUR KELLY THAT SAID THAT HE WAS LIKE THAT?

A DID NOT SAY THAT TO ME. I GOT THAT FROM HIS ATTORNEY.

Q OKAY. SO YOU CERTAINLY DIDN'T TALK TO ANY INMATES THAT SAID THAT?

A NO.

Q BECAUSE IF THERE WERE RECORDS THAT SHOWED THAT THAT CELL WASN'T LIKE THAT ON AUGUST THE 6TH OF 1998, OF THIS YEAR, WOULD THAT SURPRISE YOU?

A YES, IT WOULD.

Q BUT YOU DIDN'T FOLLOW-UP ON IT?

A I DID NOT, NO.

Q AND YOU HAD ACCESS TO ALL THESE RECORDS. CERTAINLY, THE JAIL WASN'T SAYING YOU CAN'T GET INTO ANY OF THIS?

A I – NEVER SAW ANYTHING ABOUT IT.

Q SO YOU FORMED YOUR OPINION ON AN INCOMPLETE EVALUATION?

A IF THERE'S SOMETHING ABOUT THAT THAT I NEED TO SEE, I COULD TAKE A LOOK AT IT. I HAVE NOT SEEN ANYTHING ABOUT IT YET.

Q NOW, YOU DISCUSSED HOW WILLIAM ARTHUR KELLY WOULD BE – HAVE A TOUGH TIME GOING INTO THE POPULATION OVER IN ANY [1957] SORT OF AN INSTITUTION HERE IN THE STATE?

A A RELATIVELY TOUGH TIME.

Q DID YOU TALK TO ANY OF THE INMATES OVER AT THE DETENTION CENTER TO SEE HOW THEY FELT ABOUT WILLIAM ARTHUR KELLY?

A NO, I DID NOT.

Q SO YOU DIDN'T TALK TO THE INMATES WHO WERE SCARED OF WILLIAM ARTHUR KELLY?

A NO, I DIDN'T.

Q AND YOU DIDN'T TALK TO ANYBODY WHO, BASICALLY, SAID HIS SIZE DIDN'T MATTER?

A NO, I DIDN'T.

Q AND, IN FACT, IF YOU CARRY YOURSELF IN THE RIGHT WAY, YOU ARE GOING TO BE JUST FINE, NOT ONLY IN THIS DETENTION CENTER, BUT ALSO IN THE STATE FACILITY?

A I DIDN'T TALK TO ANY OF THE OTHER INMATES, NO.

Q IF YOU CARRY YOURSELF THE RIGHT WAY, YOU ARE GOING TO BE JUST FINE NO MATTER WHAT INSTITUTION YOU'RE IN, RIGHT?

A THAT'S – THAT'S GOOD ADVICE. I THINK THAT'S CORRECT.

Q IN FACT, YOU ALSO CONSIDERED FROM THESE RECORDS THAT WILLIAM ARTHUR KELLY WAS ACTUALLY WANTING TO GO INTO ONE OF THESE INSTITUTIONS, WASN'T HE?

A I SAW A NOTE ABOUT THAT, THAT HE WAS WANTING TO GET OUT OF THE JAIL AND INTO CORRECTIONS.

[1958] Q TO SET UP HIS HOUSE?

A RIGHT. THAT'S PRISON SLANG FOR A ROOM.

Q IT SOUNDS LIKE A PRETTY COMFORTABLE PLACE FOR HIM?

A I'M NOT SURE I WOULD DESCRIBE SOUTH CAROLINA'S PRISONS AS COMFORTABLE.

Q WELL, IT DOESN'T SOUND LIKE HE'S TOO WORRIED ABOUT IT?

A WORRIED IS A GENERAL TERM. I DID HEAR WORRIED ABOUT IT, BUT THE PRISONS ARE ACTUALLY NOT AS A BAD A PLACE AS THE COUNTY JAILS.

Q IN FACT, HE SAID, WHAT ELSE COULD THEY DO TO ME ONCE THEY PUT ME IN THERE?

A I'M NOT AWARE OF THAT.

Q YOU NOT READ THAT HE SAID THAT ON OCTOBER THE 7TH OF 1996? THAT HE SAID THAT IF HE GETS A LIFE SENTENCE, WHAT ELSE COULD THE SYSTEM DO TO HIM?

A I DON'T RECALL THAT, BUT THAT'S NOT AN UNUSUAL THING FOR PEOPLE TO SAY.

Q YOU ALSO DISCUSSED, DR. SHEA, THAT MR. KELLY ISN'T A VIOLENT PERSON FROM YOUR ASSESSMENT OF HIS HISTORY.

A I SAID THAT HE HAD NO EXTENSIVE PATTERN OF VIOLENCE. I THINK THAT THE INCIDENT THAT WE ARE TALKING ABOUT HERE PROVES THAT HE IS A VIOLENT PERSON, BUT WE DON'T HAVE A LONG PATTERN OF VIOLENCE.

Q DID YOU TAKE INTO CONSIDERATION HIS STATEMENT ABOUT [1959] TORTURING AND KILLING SMALL ANIMALS AS HE WAS GROWING UP?

A I TOOK THAT INTO ACCOUNT, YES.

Q THAT WASN'T A FACTOR? THAT'S NOT VIOLENT BEHAVIOR?

A THAT WAS A FACTOR AND I TOOK IT INTO ACCOUNT.

Q IT CERTAINLY WASN'T CAUSED BY ANY MENTAL ILLNESS?

A NO, IT WAS NOT.

Q COULD BE BECAUSE YOU'RE MEAN, RIGHT?

A COULD BE.

Q AND WE BOTH AGREE THAT WAS ABOUT AS VIOLENT AN ACT AS ONE CAN DO?

A ABSOLUTELY.

Q THANK YOU, DR. SHEA.

[1960] **DR. STEVEN SHEA –**
RE-DIRECT BY MS. FULLWOOD

* * *

Q OKAY. HE ASKED YOU ABOUT TATTOOS. DOES EVERY INMATE IN THE SYSTEM THAT HAS A TATTOO A GANG MEMBER?

A NO, THEY ARE NOT.

Q ARE TATTOOS RARE IN THE PRISON SYSTEM?

A NO, THEY ARE NOT.

Q DO YOU THINK –

A IN FACT, IF I COULD EXPLAIN – IF I COULD EXPOUND ON THAT?

Q SURE.

A THEY ARE ESPECIALLY NOT UNCOMMON IN SMALLER, YOUNGER INMATES WHO ARE TRYING TO MAKE THEMSELVES LOOK TOUGHER. THEY OFTEN EVEN GET TATTOOS ON THEIR FACE, TRYING TO MAKE THEMSELVES LOOK OLDER AND TOUGHER.

Q AND OTHER PRISONERS GIVE THEM THAT?

A OR THEY GIVE IT TO THEMSELVES. EITHER ONE, YES, THEY DO.

Q HOMEMADE TATTOOS?

A YES.

Q AND THEY ARE NOT AN INDICATION PER SE OF GANG MEMBERSHIP, ARE THEY?

A NO, NOT PERSONALLY.

[1963] **JAMES E. AIKEN –**
DIRECT BY MR. KIRKLAND

* * *

WE CALL MR. JAMES AIKEN.

JAMES E. AIKEN,

FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: MY NAME IS JAMES EVANS AIKEN, A-I-K-E-N.

DIRECT EXAMINATION

BY MR. KIRKLAND:

Q MR. AIKEN, WHY ARE YOU HERE TODAY?

A I'VE BEEN ASKED TO PROVIDE EXPERT TESTIMONY IN THIS PARTICULAR CASE AS IT PERTAINS TO CORRECTIONAL MANAGEMENT.

[1974] * * *

Q OKAY. AND IS THAT BASED ON MORE WHAT YOU SAW IN HIS RECORD OR WHAT YOU DIDN'T SEE?

A WHAT WAS MOST INTERESTING TO ME IS WHAT WAS NOT IN HIS RECORD.

I MEAN, I'M NOT TRYING TO SAY THAT HIS RECORD WAS INSIGNIFICANT. WHAT I'M TRYING TO SAY AND AM SAYING WAS THAT THIS INDIVIDUAL HAD NO PRIOR CRIMINAL HISTORY, NO PRIOR CRIMINAL HISTORY PRIOR TO THIS PARTICULAR OFFENSE. THIS INDIVIDUAL DID NOT DEMONSTRATE BEHAVIORS OF TRYING TO TAKE OVER AND INVOLVE AND INFLUENCE OTHER PEOPLE IN THE MANAGEMENT OF THAT FACILITY. THIS INDIVIDUAL WAS NOT OR DID NOT PRESENT TO ME AS BEING A PREDATORIAL INSTITUTIONAL VIOLENT INDIVIDUAL.

Q OKAY. NOW, LET'S TALK ABOUT – YOU TALK ABOUT INSTITUTIONAL VIOLENT. WE ALL KNOW HE'S VIOLENT, RIGHT?

A YES.

[1975] * * *

Q IS THERE A DIFFERENCE BETWEEN WHAT YOU CALL OUTSIDE VIOLENCE AND INSTITUTIONAL VIOLENCE? HOW YOU WOULD LOOK AT THAT?

A YES. PEOPLE OFTEN DON'T UNDERSTAND THAT PRISONS ARE NOT THE COMMUNITY. THEY DON'T REPRESENT ALL OF THE COMMUNITY. WHAT THEY REPRESENT IS THOSE PEOPLE THAT CANNOT ADEQUATELY ADJUST AND PRESENT UNUSUAL RISK OF HARM TO THEIR PUBLIC. THAT'S WHAT PRISON IS ABOUT. SO YOU DON'T HAVE GOOD PEOPLE IN PRISON PER SE.

WHAT DO YOU HAVE? YOU HAVE PEOPLE IN THERE THAT ARE VERY VIOLENT, REDUNDANTLY VIOLENT. THEY NOT ONLY KILL ONE PEOPLE, THEY KILL MORE THAN ONE AND THEY DON'T HAVE – THEY – IT DOESN'T EVEN RAISE A BLOOD PRESSURE WITH THEM. ON TOP OF THAT IS THE WHOLE THING ABOUT THEM BEING IN PRISON IS SOMETHING FOR THEM TO ASPIRE TO, SO TO SPEAK.

WHAT I'M SAYING TO YOU IN ALL VERY SIMPLE LAYMAN'S LANGUAGE IS PEOPLE THAT ARE IN PRISON, ESPECIALLY IN A PRISON THAT HOUSES VIOLENT OFFENDERS, THAT MR. KELLY DOESN'T HOLD A LIGHT TO THEM IN A PRISON CONTEXT. HE'S SMALL. HE HAS NO REAL HISTORY. HE IS AN INDIVIDUAL THAT'S MARKED FOR A PRETTY TOUGH TIME IF HE IS NOT GIVEN THE CONTINUOUS OBSERVATIONS THAT'S GOING TO BE REQUIRED BECAUSE PREDATORIAL INMATES DON'T HAVE ANY

REMORSE TOWARDS ANOTHER INMATE. AND THEY ARE CONTINUOUSLY VIOLENT AND THEY ARE CONTINUOUSLY LOOKING AT WAYS TO BE VIOLENT AND I'M NOT [1976] TALKING ABOUT GESTURING. I'M TALKING ABOUT VIOLENCE. I'M TALKING ABOUT TAKING A SHANK THAT THAT'S LONG (INDICATES) AND PUTTING IT THROUGH YOU AND PULLING IT OUT AND THEN PULLING IT THROUGH AGAIN AND FOR NO REASON. AND WE HAVE SOME VERY VIOLENT PEOPLE IN OUR CORRECTIONAL SYSTEMS. WITH HIM COMING INTO THAT SYSTEM, HE WILL HAVE PROBLEMS.

Q THAT BRINGS UP AN INTERESTING POINT THAT I WANT TO ASK YOU ABOUT. ARE YOU AWARE OF AN INCIDENT INVOLVING A SHANK? DID YOU HEAR SOME TESTIMONY ABOUT THAT?

A YES, I –

Q AND AN OFFICER –

A – I READ IT IN THE INSTITUTIONAL FILES, YES.

Q AS A – AS MANAGING CORRECTIONS, WHAT KIND OF CONCERNS WOULD THAT CAUSE YOU AND WHAT WOULD YOU DO IN RESPONSE TO THAT?

A WELL, THE GENERAL CONCERN WOULD BE, YOU KNOW, OBVIOUSLY IT FITS THE NOMENCLATURE OR THE GENERAL RULE OF A SHANK, BUT THERE ARE SHANKS AND THERE ARE SHANKS. YOU KNOW, HAVING A TOOTHBRUSH THAT'S MELTED DOWN WITH A RAZOR BLADE ON, YES, IT CAN

HARM SOMEONE. AND WHAT ALSO BROUGHT TO MY ATTENTION IN DEALING WITH AGGRESSIVE PREDATORIAL TYPE INMATE POPULATION, WHAT I FOUND IN MY PROFESSIONAL CAREER, THOSE TYPE OF PEOPLE YOU DON'T FIND SHANKS ON.

Q WHAT DO YOU MEAN BY THAT? WHY WOULDN'T THEY CARRY A SHANK?

[1977] A BECAUSE THEY HAVE GOT OTHER PEOPLE TO CARRY IT FOR THEM. THEY CONTROL. THEY ARE PREDATORS. THEY DON'T CARRY THE WEAPONS ON THEM BECAUSE THEY DON'T NEED PROTECTION. YOU CARRY WEAPONS ON YOU FOR PROTECTION AND PEOPLE GESTURE BY MAKING SMALL WEAPONS AND THOSE TYPES OF THINGS. WHAT I FOUND IN MY PROFESSIONAL EXPERIENCE IS THAT REAL SHANKS ARE ONLY CARRIED BY PEOPLE WHO WORK FOR PEOPLE AND THOSE ARE NOT PREDATORIAL PEOPLE. THOSE ARE PEOPLE THAT WE, FOR LACK OF A BETTER WORD, CALL THEM WIMPS. THOSE PEOPLE ARE CONTROLLED BY THE POWER SOURCE WITHIN THAT FACILITY.

Q IF YOU HAD A SITUATION, ASSUMING FOR A MOMENT THAT WHAT YOU READ WAS TRUE AND THAT BILLY KELLY HAD THIS SHANK ON HIM, AND MANAGEMENT OF CORRECTIONS, HOW WOULD THAT TYPICALLY BE HANDLED? ARE THERE PROCEDURES IN PLACE?

A YES, CERTAINLY. YOU CONDUCT SHAKEDOWNS AROUND THE AREAS. YOU INTERROGATE THE INDIVIDUAL TO SEE HOW, WHEN AND WHERE, YOU KNOW, THIS WAS MADE. YOU CHECK THE CELL

AREA WITH OTHER INMATES LIVING IN IT TO MAKE SURE THAT THAT'S DONE AND YOU TAKE THEM BEFORE THE ADJUSTMENT COMMITTEE AND AN ADJUSTMENT COMMITTEE BEING AN INTERNAL ADMINISTRATIVE PROCESS AND YOU MAKE A DECISION IN RELATIONSHIP TO IT'S A FAIRLY SEVERITY OF THE CASE, WHAT TYPE OF PUNISHMENT SHOULD BE RECEIVED. AND I THINK, IF I'M NOT MISTAKEN, HE RECEIVED SEVERAL DAYS ON ADMINISTRATIVE LOCKUP OR CELL CONFINEMENT, IF I'M NOT MISTAKEN.

[1978] Q AND ARE THERE – IN THE PRISON SYSTEM, ARE THERE THINGS IN PLACE FOR DISCIPLINARY VIOLATIONS LIKE THAT?

A YES.

Q WHAT KIND OF THINGS OCCUR?

A WELL, YOU HAVE AN ADMINISTRATIVE HEARING. YOU HAVE A PROPER INVESTIGATION AND IF THERE IS A FINDING OF GUILT, THEN PUNISHMENT IS GIVEN WHERE YOU DON'T HAVE TO GO TO A COURT OF LAW FOR THAT TO BE ADMINISTERED. IT CAN BE ADMINISTERED BY TAKING GOOD TIME AWAY FROM PEOPLE OR CONFINING TO A CELL FOR A PARTICULAR PERIOD OF TIME, ET CETERA.

Q OKAY. AND ARE THERE SPECIAL LOCKUPS AND THINGS LIKE THAT?

A YES. YOU HAVE SPECIAL CONFINEMENT AREAS FOR THAT TYPE OF POPULATION WHERE THAT INMATE IS IN SORT OF THE JAIL FOR THE JAIL,

SO TO SPEAK. SO IF A PERSON DOES NOT DEMONSTRATE THE BEHAVIORS THAT YOU WOULD EXPECT, THAT PERSON COULD BE LOCKED UP THERE. BUT WITH THE SAME TOKEN, IF THAT INDIVIDUAL VIOLATES THE LAWS OR RULES THAT REQUIRES LETHAL FORCE, THAT PERSON CAN BE KILLED BY THE OFFICIALS.

Q I WANT TO BRING IT TO YOUR ATTENTION ANOTHER INCIDENT. DID YOU READ IN THE REPORT ANYTHING ABOUT A MORTAR IN A BLOCK BEING SCRAPED OUT?

A YES.

Q AND HAVE YOU HAD – I DON'T KNOW IF YOU HEARD ANY – [1979] DID YOU HEAR ANY TESTIMONY ON THAT AT ALL?

A I HEARD PART OF IT THIS MORNING.

Q WHAT IS THE SIGNIFICANCE OF THAT PARTICULAR INCIDENT?

A WELL, THE SIGNIFICANCE OF IT, YOU KNOW, OBVIOUSLY IN A CORRECTIONAL ENVIRONMENT, YOU DON'T FORGET ABOUT ANYTHING BECAUSE YOU END UP BEHIND THE EIGHT-BALL. BUT THE THINGS THAT I LOOK AT WHEN WE LOOK AT SOMEONE DIGGING OUT AROUND A WINDOW OR DIGGING A CELL BLOCK, YOU KNOW, IS THIS AN ESCAPE ATTEMPT OR IS THIS DESTRUCTION OF PROPERTY AND DESTRUCTION OF PROPERTY OBVIOUSLY IS THAT, DID THIS TAKE PLACE.

AND THEN IN MAKING CONSIDERATION OF AN ESCAPE ATTEMPT, YOU KNOW, I TAKE INTO CONSIDERATION AT LEAST THE PRISONS THAT I OPERATED MOSTLY, ESPECIALLY OF NEW DESIGN. YOU DON'T JUST HAVE THE CINDER BLOCK. YOU KNOW, AND YOU'VE PROBABLY SEEN CINDER BLOCKS WITH THE HOLES IN THE MIDDLE. WELL, IN A PRISON, YOU DON'T JUST PUT THOSE BLOCKS THERE. WHAT YOU DO IS YOU SET THE BLOCKS IN CONCRETE AND THEN YOU POUR THE CONCRETE INTO THE BLOCKS AND BEFORE YOU EVEN DO THAT, YOU PUT WHAT IS KNOWN AS RE-BAR, WHICH IS STEEL RODS AND THEY RANGE FROM A HALF-INCH, A QUARTER INCH, WHATEVER, DOWN THERE AND THEN YOU IMPACT IT WITH THE CONCRETE BECAUSE INMATES IN FACILITIES THAT I'VE MANAGED THAT WERE UNDER FAIRLY NEW CONSTRUCTION, THEY CAN PICK AWAY ALL THEY WANT. IF THEY CAN GET THROUGH THAT CONCRETE AND GET THROUGH THAT STEAL RE-BAR, THE STAFF IS NOT DOING THEIR JOB. BECAUSE [1980] ITS GOING TO TAKE A LONG TIME WITH PEOPLE NOT OBSERVING AND PEOPLE NOT DOING THEIR JOBS. AND THEN WHEN THAT INDIVIDUAL GETS THROUGH ALL OF THAT, THEY'VE STILL GOT TO GO THROUGH THE PERIMETER AND THAT'S THE FENCE ON THE OUTSIDE WHERE YOU HAVE, YOU KNOW, WHAT'S – THEY DON'T EVEN USE BARBWIRE ANYMORE. THEY USE WHAT WE CALL AS MAN-BARRIER WIRE AND MAN-BARRIER WIRE IS SHARP AS RAZOR BLADES AND WHEN YOU HIT IT, IT FLIES OUT AT YOU AND ENCOMPASSES YOU AND JUST

CUTS YOU TO SMITHEREENS AND WE ARE NOT EVEN TALKING ABOUT THE ELECTRONIC SURVEILLANCE SYSTEMS WITHIN THE PERIMETER. AND WE ARE NOT TALKING ABOUT OFFICERS ARMED WITH AUTOMATIC WEAPONS TO STOP AN' ESCAPE ATTEMPT ON TOP OF THAT.

SO WHEN YOU LOOK AT IT, IT'S NOT MINIMIZING IT, BUT THESE ARE THE STEPS AND THESE ARE THE THINGS THAT I CONSIDER WHEN I'M RENDERING DECISIONS AS TO AN INDIVIDUAL'S INVOLVEMENT IN THESE TYPE OF ACTIVITIES.

[1981] * * *

MR. KIRKLAND: LET ME ASK YOU THIS. IN YOUR EXPERIENCE IN TERMS OF WHERE PEOPLE ARE ASSIGNED AND CLASSIFICATION, THE OFFENSE IS CONSIDERED?

THE WITNESS: YES. THE OFFENSE IS, AS I STATED PREVIOUSLY, YES.

Q NOW, LET'S ASSUME FOR A MOMENT THAT EVERYTHING IN BILLY KELLY'S JAIL RECORD IS TRUE AND WE KNOW ALREADY THAT HE'S GUILTY OF A VERY VIOLENT OFFENSE. SO ASSUMING ALL THAT TO BE TRUE, CAN THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS IN YOUR OPINION MANAGE HIM AS AN INMATE?

A THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS IS NOT ONLY CAPABLE OF MANAGING THIS INMATE, IN MY CANDID OPINION, HAS

TAKEN A NATIONAL LEAD IN MANAGING THIS TYPE OF INMATE POPULATION.

[1984] **JAMES E. AIKEN – CROSS BY MR. MYER**

* * *

Q AND YOU WERE TALKING ABOUT IF THERE WAS AN INFRACTION, THAT THERE WOULD BE AN ADMINISTRATIVE HEARING WITH THE PRISONER THERE. AND THEN, BASED ON THE OUTCOME OF GUILT, THEN CERTAIN THINGS COULD TAKE PLACE AND THAT BEING YOU COULD TAKE AWAY HIS GOOD TIME –

MR. KIRKLAND: OBJECTION, YOUR HONOR –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

[1985] THE SOLICITOR: WELL, THAT'S WHAT THEY BOUGHT OUT ON DIRECT.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, I HAVE A MATTER OF LAW I NEED TO TAKE UP WITH THE LAWYERS.

I'M GOING TO SEND YOU TO THE JURY ROOM. WHILE YOU ARE THERE, PLEASE DO NOT DISCUSS THIS CASE AMONG YOURSELVES. WE'LL GET YOU BACK IN JUST A MOMENT.

(JURY OUT.)

THE COURT: YES, SIR.

MR. KIRKLAND: YOUR HONOR, MR. MYERS KNOWS THERE ARE NO GOOD TIME CREDITS IN A LIFE SENTENCE.

THE SOLICITOR: I'LL BE GLAD FOR THIS LADY TO READ BACK HIS ANSWER ON DIRECT. AND I WROTE IT DOWN RIGHT HERE.

MR. KIRKLAND: I DON'T DISPUTE THE FACT –

THE COURT: JUST ONE MOMENT. NOW, HE'S ON CROSS-EXAMINATION. IF HE HAS MADE SOME TYPE – HE'S AN EXPERT. HE'S COME IN HERE AND YOU'VE QUALIFIED HIM AS AN EXPERT, SO READ ME YOUR – READ ME THE ANSWER BACK, SOLICITOR, AND IF I HAVE TO –

THE SOLICITOR: THEY WERE ASKING ABOUT ADMINISTRATIVE HEARINGS RELATING TO THE SHANK AND HE SAID THERE WOULD BE A HEARING AND BASED ON A DETERMINATION OF GUILT, THAT THERE WOULD BE SOME SANCTIONS IMPOSED, INCLUDING TAKING AWAY GOOD TIME, PUTTING THEM IN LOCKUP, [1986] WHICH HE CLASSIFIED AS THE JAIL FOR THE JAIL, AND THEY COULD DO OTHER THINGS, INCLUDING, I THINK, HE SAID MAYBE BRINGING CRIMINAL CHARGES LATER ON.

NOW, THAT'S WHAT THEY BROUGHT OUT. I SAT HERE AND KEPT MY MOUTH SHUT AND LISTENED TO THEM.

THE COURT: WHAT'S YOUR OBJECTION NOW?

MR. KIRKLAND: YOUR HONOR, HE CANNOT PUT OUT INFORMATION FOR A JURY TO BASE THEIR SENTENCE ON.

MR. AIKEN WAS SPEAKING GENERICALLY IN THOSE TERMS. AND I THINK THAT THE ONLY REASON IT IS BEING BROUGHT OUT IS TO MISLEAD THE JURY ABOUT THE SENTENCE, TO MAKE THEM BELIEVE THAT A PERSON WITH LIFE GETS CREDIT FOR GOOD TIME. THAT'S THE ONLY REASON IT'S BEING BROUGHT OUT. AND I ASKED, MR. MYERS, IF THERE IS ANY OTHER REASON FOR THAT. I CAN'T IMAGINE WHAT THERE WOULD BE.

THE COURT: WELL, IF THIS MAN IS AN EXPERT, HE WILL BE ABLE TO EXPLAIN THAT THEN.

MR. KIRKLAND: YOUR HONOR, I THINK IT'S AN IMPROPER QUESTION.

THE COURT: MR. KIRKLAND, IT – MR. KIRKLAND, YOU KNOW, THE THING ABOUT IT. WHENEVER YOU BRING A WITNESS TO TESTIFY AND I UNDERSTAND THE REASON THAT YOU ARE BRINGING THESE WITNESSES TO TESTIFY. WHEN THEY MAKE STATEMENTS ON DIRECT EXAMINATION, THEN THEY ARE SUBJECT TO CROSS-EXAMINATION ON THOSE. AND, ONCE AGAIN, THAT IS THE [1987] PURPOSE OF DIRECT, CROSS, REDIRECT AND RECROSS. AND IF THERE'S SOMETHING THAT NEEDS TO BE CLARIFIED, YOU MAY DO SO. HE IS AN EXPERT. I'M SURE THAT HE'S TESTIFIED A NUMBER

OF TIMES AND HE'LL PROBABLY BE ABLE TO CLEAR IT UP AND ANSWER IT HIMSELF, BUT I THINK THAT IT'S A PROPER QUESTION.

IF YOU WANT THE COURT REPORTER TO PLAY IT BACK TO ME, I'LL BE GLAD FOR HER TO DO IT FOR ME.

MR. KIRKLAND: JUST ONE MOMENT, YOUR HONOR.

YOUR HONOR, I WOULD LIKE TO RAISE A COUPLE OTHER MATTERS THAT I WOULD LIKE TO PUT ON THE RECORD.

THE COURT: ALL RIGHT.

MR. KIRKLAND: THIS IS SOMETHING THAT MR. KELLY HAS ABSOLUTELY NO CONTROL OVER, THE TERMS OF HIS INCARCERATION –

THE COURT: YES, SIR.

MR. KIRKLAND: – IN ADDITION TO THAT, I MEAN, THESE ARE THINGS THAT ARE OUT BY OUR LEGISLATURE. NOT THAT MR. AIKEN IS INVOLVED IN. AND I DON'T THINK THOSE ARE PROPER THINGS TO PUT BEFORE THE JURY.

SO – AND I'M GOING TO FINISH UP. AND MY LAST POINT IS –

THE COURT: ALL RIGHT.

MR. KIRKLAND: – AND IT'S JUST SORT OF REITERATION. IT'S OF NO CONCERN OF THE JURY

WHAT HAPPENS [1988] TO HIM AFTER INCARCERATION IN TERMS OF THE WAY THE SENTENCES ARE HANDLED BECAUSE THAT'S ALL DONE BY STATUTE.

THE COURT: WELL, THEN – YOU KNOW, YOU HAVE ASKED HIM QUESTIONS ABOUT THAT.

MR. KIRKLAND: YOUR HONOR, I'M TALKING ABOUT IN PARTICULAR ABOUT THE FRAMEWORK OF THE SENTENCE ITSELF. WHETHER IT'S GOOD TIME, PAROLE OR ANYTHING LIKE THAT. THOSE ARE THINGS THAT THE JURY ARE NOT SUPPOSED TO CONSIDER.

THE COURT: I THINK THAT ANY TIME WE START TALKING ABOUT PAROLE ELIGIBILITY, THAT THOSE ARE CLEARLY IMPROPER AND NOT FOR THE JURY'S CONSIDERATION. BUT YOU KNOW I CAN CHARGE THEM AT THE APPROPRIATE TIME AS TO THE MEANINGS OF A SENTENCE IN THIS STATE, BUT, YOU KNOW, I'M HAVING A DIFFICULT TIME WHEN HE COMES IN AND TESTIFIES AS TO CERTAIN THINGS ON DIRECT EXAMINATION WHY THE SOLICITOR CAN'T GET INTO THEM ON CROSS AND THEN HIM EXPLAIN OR YOU CLARIFY IT ON REDIRECT. YOU KNOW, ONCE AGAIN, THIS IS A MAN WHO, FROM MY LISTENING TO HIS TESTIMONY, HAS TRAVELED THIS COUNTRY FAR AND WIDE. HE'S EVEN BEEN OUT OF THE COUNTRY IN POSSESSIONS PERFORMING FUNCTIONS. HE IS AN EXPERT IN THIS FIELD AND WHY SHOULD I LIMIT THE STATE'S QUESTIONING OF HIM INSOFAR AS TRYING TO ESTABLISH OR GET TO THEIR LINE OF QUESTIONING.

SOLICITOR, HOW ABOUT ASKING YOUR QUESTION OF HIM [1989] AND LET ME HEAR WHAT HIS ANSWER IS GOING TO BE.

THE SOLICITOR: WHEN YOU SAID ADMINISTRATIVE HEARINGS AND SOMEONE IS FOUND GUILTY, THERE ARE SEVERAL SANCTIONS OR PENALTIES THAT COULD BE IMPOSED. YOU SAID YOU COULD TAKE AWAY HIS GOOD TIME, YOU COULD PUT HIM IN LOCKDOWN OR LOCKUP, AS THEY SAID, WHICH YOU SAID WAS A JAIL FOR THE JAIL, OR OTHER TYPE OF PUNITIVE MEASURES COULD BE IMPOSED. IS THAT WHAT YOU SAID BASICALLY, MR. AIKEN?

A IN GENERIC TERMS. IT WAS ASKED ME IN GENERIC TERMS WHAT – YES. THE ANSWER IS YES.

Q THANK YOU.

MR. KIRKLAND: YOUR HONOR, I JUST WANT TO RAISE AND I'M GOING TO CITE A CASE THAT MS. FULLWOOD HAS VERY GRACEFULLY HANDED TO ME, *GARNER VERSUS FLORIDA*. IT TALKS ABOUT WHERE A DEFENDANT CANNOT EXPLAIN OR CONTROL THE CONDITIONS OF INCARCERATION.

I JUST WANT TO PUT THAT A VIOLATION OF THE EIGHTH AMENDMENT, A VIOLATION OF THE LAW OF THAT CASE IN TERMS OF EVER GETTING INTO THAT, DISCUSSING.

THE COURT: WHAT SAYS THE STATE ABOUT THAT?

THE SOLICITOR: I'M NOT ASKING HIM ABOUT HIM CONTROLLING HIS INCARCERATION. I'M JUST ASKING HIM SOME STUFF ON CROSS-EXAMINATION TO WHICH HE TESTIFIED ON DIRECT. I DIDN'T ASK HIM THOSE QUESTIONS ON DIRECT. HE'S NOT MY WITNESS. BUT I DON'T THINK MY HAND SHOULD BE TIED ON ME [1990] CROSS-EXAMINING HIM BASED ON INFORMATION THEY DIRECTLY BROUGHT OUT AND THAT'S *STATE VERSUS RAYMOND PATTERSON*.

THE COURT: SUSTAIN THE OBJECTION.

NOW, I'M GOING TO OVERRULE YOUR OBJECTION, ALLOW HIM TO ASK THE QUESTION. I THINK THAT IT IS A PROPER QUESTION FOR CROSS-EXAMINATION AND I'M GOING TO ALLOW HIM TO – THIS MAN TO ANSWER IT.

IF HE NEEDS TO EXPLAIN IT, IF YOU NEED TO CLEAR IT UP ON REDIRECT, YOU MAY DO SO.

THE SOLICITOR: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

LET'S BRING OUR JURY BACK.

SO THE RECORD IS CLEAR, THE OBJECTION OF THE DEFENSE IS OVERRULED.

(JURY IN.)

THE COURT: THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

ALL RIGHT, SOLICITOR.

THE SOLICITOR: THANK YOU, YOUR HONOR.

CONTINUED CROSS-EXAMINATION

BY MR. MYERS:

Q NOW, I WAS ASKING YOU, MR. AIKEN, YOU WERE TALKING ABOUT THAT SHANK AND THEY WERE ASKING YOU ABOUT HAVING SHANKS OR CONTRABAND, WHAT WOULD BE DONE. AND YOU SAID THERE WOULD BE ADMINISTRATIVE HEARINGS WITH THE INMATE [1991] THERE, THE PRISONER THERE?

A YES.

Q AND A DETERMINATION –

A USUALLY YOU WOULD HAVE SOMEONE – USUALLY THE INMATE WOULD AND CAN REQUEST TO BE PRESENT, YES.

Q AND UPON FINDING THAT THIS ACTUALLY HAPPENED, THEN THERE ARE CERTAIN SANCTIONS TO BE IMPOSED AND YOU LISTED OUT SOME?

A YES.

Q YOU TALKED ABOUT TAKING AWAY GOOD TIME, DIDN'T YOU?

A GENERICALLY SPEAKING –

Q YES, SIR –

A – AND WHEN I SAY GENERICALLY, WE ARE NOT TALKING ABOUT THIS PARTICULAR CASE.

Q NO. CERTAINLY NOT. WE ARE TALKING ABOUT – YOU SAID LOCKDOWN OR LOCKUP AND YOU TERMED IT PUTTING THEM IN A JAIL IN THE JAIL?

A THAT IS CORRECT.

Q AND COULD IMPOSE OTHER SANCTIONS?

A THAT IS CORRECT.

Q AND THAT QUESTION WAS ASKED IN REGARD TO A SHANK THAT THE DEFENDANT HAD AT THE LEXINGTON COUNTY JAIL?

A I UNDERSTOOD THE QUESTION OF A PERSON HAVING POSSESSION OF A SHANK GENERICALLY. NOT THIS PARTICULAR INDIVIDUAL IN THIS PARTICULAR CASE.

[1992] Q OH, I THOUGHT IT WAS ASKED ABOUT THIS CASE IN REGARD TO THAT SHANK.

A SAID AREN'T THERE ADMINISTRATIVE HEARINGS, AND, YES, ADMINISTRATIVE HEARINGS DO TAKE PLACE.

NOW, AS FOR THE MERITS AND THE DISPOSITION OF THIS PARTICULAR CASE, I THINK THEY CONFINED HIM IN HIS CELL FOR A PERIOD OF TIME, IF I'M NOT MISTAKEN.

Q BUT YOU DON'T KNOW IF THE LEXINGTON COUNTY JAIL HAS A PROCEDURE WHERE THEY HAVE ADMINISTRATIVE HEARINGS AND THEY DO

ALL THIS STUFF? YOU'RE TALKING SOME OTHER – JUST A HYPOTHETICAL IN SOME PRISON SOMEWHERE?

A THAT'S CORRECT. I DO KNOW, BASED ON THE RECORDS THAT I READ, THE LEXINGTON COUNTY JAIL, SOME TYPE OF PROCESS TOOK PLACE AND THE OFFICIALS OF THAT FACILITY MADE A DISPOSITION IN THE CASE.

Q AND THEY ASKED YOU ABOUT PEOPLE CHISELLING AROUND A BLOCK. I THOUGHT IT WAS ABOUT THIS CASE TO BE FRANK WITH YOU. AND CHISELLING CONCRETE AND MORTAR FROM AROUND A BLOCK IN A CELL AND YOU WENT INTO DETAIL ABOUT THE CONSTRUCTION OF A PRISON. YOU TALKED ABOUT THE BLOCKS AND THE CEMENT BEING DOWN THERE AND THE METAL BARS AND THE RAZOR BLADE WIRES AND THE PERIMETER GUARD.

A MY RESPONSE TO THAT, SIR, WAS IN RELATIONSHIP TO WHAT I WOULD CONSIDER IF I FOUND PLACES AROUND WINDOWS OR WHATEVER REMOVED, IS THIS DESTRUCTION OF PROPERTY, COUNTY [1993] PROPERTY IN THIS PARTICULAR CASE OR STATE PROPERTY OR FEDERAL PROPERTY OR IS THIS A VALIDATED ESCAPE ATTEMPT AND WHAT ARE SOME OF THE THINGS THAT I TAKE UNDER CONSIDERATION AS A CORRECTIONAL ADMINISTRATOR IN MAKING – IN RENDERING THOSE TYPE OF DECISIONS.

Q AND, OF COURSE, IF THAT BLOCK DID HAVEN'T STEEL RODS IN IT OR CEMENT POURED

DOWN IN IT OR THERE WASN'T THIS HIGH TECH RAZOR BLADE WIRE AND THERE WASN'T A PERIMETER GUARD OUT THERE AND THAT WOULD MAKE A DIFFERENT DETERMINATION?

A YES, IT WOULD. IT WOULD MAKE A - IT WOULD REALLY CAUSE ME A GREAT DEAL OF CONCERN TO HAVE THIS TYPE OF PERSON ACCUSED OF THIS TYPE OF OFFENSE HOUSED IN THAT TYPE OF AREA. I MEAN, YOU HAVE TO ASSUME THAT THIS INDIVIDUAL IS A MAXIMUM SECURITY INMATE, AND EVEN THOUGH HAS NOT BEEN ADJUDICATED, THAT WE HAVE TO MAKE SURE THAT THIS INDIVIDUAL DOESN'T HAVE ANY OPPORTUNITY TO DO ANYTHING UNTIL THE COURT OF LAWS MAKE A DECISION.

Q DID YOU KNOW THE LEXINGTON COUNTY CELL HE WAS IN DID NOT HAVE THE CONCRETE POURED IN THERE AND IT DIDN'T HAVE ANY METAL RODS?

A I HAVE NO PERSONAL KNOWLEDGE OF THAT.

Q IT DIDN'T HAVE GUARDS OUT PAST IT?

A I HAVE NO PERSONAL KNOWLEDGE OF THE CONSTRUCTION OF THAT PARTICULAR - ALL I'M SAYING VERY SIMPLY IS THAT IF I'M HOUSING THIS TYPE OF INMATE, I WANT TO MAKE SURE THAT [1994] THE PUBLIC IS PROTECTED AND THAT INMATE IS USUALLY HOUSED IN THAT TYPE OF DESIGN FACILITY.

Q THE MOST SECURE FACILITY IN SOUTH CAROLINA IS DEATH ROW, ISN'T IT?

A NOT NECESSARILY.

MR. KIRKLAND: OBJECTION, YOUR HONOR.

THE COURT: STATE YOUR GROUND.

MR. KIRKLAND: SIDE BAR, YOUR HONOR.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AT THIS TIME OFF THE RECORD.)

THE COURT: OBJECTION IS OVERRULED.

THE SOLICITOR: THANK YOU.

ISN'T IT TRUE THAT DEATH ROW IS THE MOST SECURE FACILITY IN SOUTH CAROLINA?

THE WITNESS: IN SOUTH CAROLINA?

Q YES, SIR.

A MY UNDERSTANDING IS THAT DEATH ROW POPULATION IS NOT HOUSED IN A SEPARATE PRISON. DEATH ROW POPULATION IS HOUSED IN A PORTION OR A COMPONENT OF A MAJOR FACILITY. SO, YES, IT WOULD BE - DEATH ROW POPULATION WOULD BE HOUSED IN THE MOST SECURE AREA, THE MOST SECURE PRISON, BUT THE POINT IS, IS THAT THAT'S ONLY ONE SMALL PART OF A MAJOR PRISON THAT IS EQUALLY SECURE.

Q IN THAT ONE SMALL PART, DEATH ROW, THAT'S THE MOST SECURE IN SOUTH CAROLINA?

[1995] **JAMES E AIKEN – RE-DIRECT BY MR KIRKLAND**

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A NOT NECESSARILY SO.

Q THANK YOU.

THE COURT: MR. KIRKLAND.

REDIRECT EXAMINATION

BY MR. KIRKLAND:

Q MR. AIKEN, LET ME CLEAR UP A COUPLE OF THINGS HERE. I'M GOING TO ASK YOU AGAIN THIS PARTICULAR QUESTION. ASSUMING EVERYTHING THAT MR. MYERS ASKED YOU TO BE TRUE, THE WORSE CASE SCENARIO, BILLY KELLY WAS TRYING TO CUT HIS WAY OUT, BILLY KELLY HAD A SHANK, COULD A FACILITY IN YOUR OPINION IN SOUTH CAROLINA COULD THAT TYPE OF INMATE BE HANDLED FOR THE REST OF HIS LIFE?

A YES. THAT INDIVIDUAL CAN BE ADEQUATELY MANAGED NOT TO PRESENT THE RISK OF HARM TO THE PUBLIC, STAFF, OTHER INMATES. THE STATE OF SOUTH CAROLINA IS VERY CAPABLE TO TAKE WHATEVER MEASURES IS NECESSARY TO PREVENT THIS FROM HAPPENING.

I, AS A CORRECTIONAL COMMISSIONER IN INDIANA, HAVE KILLED INMATES TO PREVENTS [sic] THAT FROM HAPPENING. SO, I'M NOT TALKING ABOUT HYPOTHETICAL SITUATIONS. WHAT I AM

SAYING IS THAT THIS STATE IS MORE THAN CAPABLE OF MANAGING THAT POPULATION, THAT INDIVIDUAL IN THE CONFINES OF THEIR FACILITIES.

Q IF BILLY KELLY DID THESE TYPES OF ACTIVITIES INSIDE AN INSTITUTION, COULD HE BE SECURED IN A PLACE JUST AS [1996] SECURE AS DEATH ROW?

A PROBABLY MORE SECURE. I MEAN, WHEN I SAY MORE SECURE, THAT WOULD BE IN A LOCKUP AREA THAT HAS MORE SHAKEDOWNS, A LOCKUP AREA THAT HAS CLOSER SUPERVISION, VISITING MONITORING EVEN CLOSELY BECAUSE THESE INDIVIDUALS HAVE DEMONSTRATED THOSE BEHAVIORS WITHIN A CORRECTIONAL ENVIRONMENT THAT CONTINUED THEIR VIOLENT WAYS AND WE HAVE WAYS OR THEY HAVE WAYS NOW TO MANAGE THAT TYPE OF POPULATION.

Q IS THAT SOMETHING THAT'S DONE EVERY SINGLE DAY IN THE DEPARTMENT OF CORRECTIONS?

A EVERYDAY. EVERYDAY.

Q IS THAT THEIR PURPOSE TO HANDLE PEOPLE LIKE BILLY KELLY?

A THAT'S WHAT WE ARE IN BUSINESS FOR AND PEOPLE MUCH WORSE THAN BILLY KELLY.

Q THANK YOU.

[1999] **MOTIONS**

* * *

MS. FULLWOOD: YOUR HONOR, WE DO HAVE ONE REQUEST TO CHARGE.

OF COURSE, AT THIS TIME, I WOULD RENEW THE MOTIONS I MADE AT THE CLOSE OF THE STATE'S CASE.

THE COURT: YES, MA'AM.

ALL RIGHT. THE MOTIONS THAT WERE MADE AT THE END OF THE STATE'S CASE, I BELIEVE THAT THAT WAS –

MS. FULLWOOD: THAT WAS FOR A DIRECTED VERDICT OR TO STRIKE THE TORTURE –

THE COURT: AS TO THE PHYSICAL TORTURE –

MS. FULLWOOD: YES, SIR.

THE COURT: – YES, MA'AM.

THE MOTION IS DENIED.

LET ME ASK YOU THIS, MS. FULLWOOD. THIS CHARGE THAT YOU HAVE GIVEN ME, I BELIEVE, THAT THAT WAS EFFECTIVE 5/20 OF '96, IF I'M NOT MISTAKEN AND DID THIS NOT OCCUR 1/5/96.

MS. FULLWOOD: YOUR HONOR, WHAT I HAVE IS –

THE COURT: YOURS MAY BE A LITTLE MORE CURRENT THAN MINE.

MS. FULLWOOD: – THAT PART OF THE CODE FROM THE SUPPLEMENT.

[2000] NOW, WHEN I LOOK AT THE STATUTORY HISTORY HERE, IT REFERS TO 1995 ACT NUMBER 83, EFFECTIVE JANUARY 1 OF '96, AND THEN IN THE EDITOR'S NOTE, IT STATES THAT THAT AMENDMENT WAS A SUBSTANTIAL REVISION [sic] THE 1996 PROVISION THAT WAS EFFECTIVE MAY 20TH. IT STATES THAT IF I ADDED SUB-ITEM ONE IN SUBSECTION C, WHICH WOULD BE – OH, MY GOODNESS. IT LOOKS LIKE IT AMENDED AGGRAVATING CIRCUMSTANCES. I DON'T HAVE THE TEXT OF EITHER OF THOSE ACTS.

THE COURT: YOU KNOW, I KNOW WHEN THE ACT WAS REVISED AND MAYBE Y'ALL CAN ALL GIVE ME SOME GUIDANCE HERE. I'M TRYING TO, I GUESS, FIND OUT IS THIS –

MS. FULLWOOD: JUDGE, JUST READING THE NOTES IN THE STATUTORY HISTORY, IT SAYS THAT THE ACT EFFECTIVE MAY 20TH OF '96 ADDED THE AGGRAVATING CIRCUMSTANCE OF MURDER OF A WITNESS OR A POTENTIAL WITNESS COMMITTED ANY TIME DURING THE CRIMINAL PROCESS. THAT'S THE ONLY REVISION IT NOTES WHEREAS THE PROVISION –

THE COURT: OTHER PROVISIONS WERE EFFECTIVE JANUARY 1 OF '96.

MS. FULLWOOD: YES, SIR.

WHICH, OF COURSE, WAS PRIOR TO THE DATE OF THIS MURDER.

THE COURT: DOES THE STATE AGREE WITH THAT?

THE SOLICITOR: WELL, IT'S IMMATERIAL BECAUSE I'M [2001] NOT GOING TO ARGUE FUTURE DANGEROUS [sic]. SO THAT TAKES IT OUT OF *SIMMONS* ANYHOW.

MS. FULLWOOD: YOUR HONOR –

THE COURT: YES, MA'AM.

MS. FULLWOOD: –THE STATE HAS ALREADY RAISED FUTURE DANGEROUSNESS. IT RAISED IT IN ITS CASE IN CHIEF BY CALLING CORRECTIONAL OFFICERS TO TESTIFY TO AN ESCAPE ATTEMPT, TO TESTIFY TO THE FACT THAT MY CLIENT HAD POSSESSION OF A SHANK, BY CALLING INMATES WHO TESTIFIED TO HIS BEHAVIOR IN THE JAIL, TO TESTIFY TO HIS PLAN TO TAKE A FEMALE GUARD HOSTAGE. THEY TESTIFIED THAT HE TALKED FREQUENTLY ABOUT ESCAPE.

THE CLEAR INFERENCE THAT THEY SEEK FOR THE JURY TO DERIVE FROM THIS EVIDENCE IS THAT HE HAS A VIOLENT CHARACTER. HE IS GOING TO BE DANGEROUS IN THE FUTURE. THAT IS A PART OF HIS CHARACTER. I BELIEVE THAT IS THE INFERENCE THEY ARE TRYING TO GET THE JURY TO ARRIVE AT. THEY HAVE RAISE [sic] FUTURE DANGEROUSNESS IN THE TYPE OF CASE THEY PUT UP IN AGGRAVATION.

THEY ALSO RAISE THOSE INFERENCES THROUGH THEIR CROSS-EXAMINATION OF OUR

EXPERT WITNESSES AS TO THOSE MATTERS CONTAINED IN THE JAIL RECORDS. FUTURE DANGEROUSNESS HAS ALREADY BEEN PUT AT ISSUE BY THE STATE ITSELF IN ITS CASE IN CHIEF. THAT'S OUR POSITION.

THE SOLICITOR: I CAN'T UNDERSTAND HOW PAST [2002] CONDUCT SOMEHOW THROWS IT OUT INTO THE FUTURE. WE ARE TALKING ABOUT HIS PAST BACKGROUND, CONDUCT, CHARACTER. I AM NOT GOING TO TALK ABOUT THIS DEFENDANT POSING A FUTURE DANGER TO THE PUBLIC AND TO SOCIETY. *STATE VERSUS ROGERS* TALKED A LITTLE BIT ABOUT THAT, BUT I AM NOT GOING TO ARGUE THAT AND THERE HAS BEEN NO EVIDENCE. I DIDN'T PUT UP ANY PSYCHIATRIST OR PSYCHOLOGIST THAT SAID THIS MAN WILL KILL AGAIN IN THE FUTURE.

MS. FULWOOD: WELL, YOUR HONOR, MY POSITION WOULD BE THAT DANGEROUSNESS ISN'T SIMPLY A QUESTION OF WHETHER HE WILL KILL AGAIN IN THE FUTURE. IT'S A QUESTION OF WHETHER HE MIGHT POSE A RISK OF HARM TO ANYONE IN THE FUTURE. THEY HAVE CLEARLY RAISED THE INFERENCE THAT IT HAS. I DON'T THINK THEY HAVE TO USE THE TERM OF ART FUTURE DANGEROUSNESS IN THEIR ARGUMENT TO BRING IT INTO ISSUE. THE IMPLICATION HAS ALREADY BEEN PLACED IN THE RECORD. THEY PLACED IT IN THE RECORD AND I FEEL SURE THAT THE ARGUMENT THAT'S GOING TO BE MADE BY

THE SOLICITOR WILL, AT LEAST, IN PART, INDIRECTLY REMIND THE JURY THAT THE STATE'S POSITION IS THAT HE WILL POSE A TREAT [sic] OF HARM TO OTHER PEOPLE IN THE PRISON POPULATION OR OUTSIDE THE PRISON POPULATION SHOULD HE MANAGE TO ESCAPE IF THEY GIVE HIM A LIFE SENTENCE. IT'S ALREADY AN ISSUE IN THE CASE, JUDGE, SO WE ASK FOR THAT CHARGE.

THE SOLICITOR: IT IS NOT AND *STATE VERSUS* [2003] *ROGERS* DISTINGUISHES BETWEEN ACTS IN PRISON AND ACTS TO THE PUBLIC.

STATE VERSUS BO SULLIVAN, A CASE WE TRIED, YOUR HONOR, TALKS ABOUT THAT. I SAID IT IN THAT CASE, I WASN'T GOING TO ARGUE FUTURE DANGEROUS [sic] TO THE PUBLIC. I DIDN'T AND THE SUPREME COURT UPHELD IT.

THE COURT: ALL RIGHT.

I'VE GOT ONE CASE I NEED TO READ. I'LL RULE ON THAT WHEN I COME BACK ON THE BENCH.

THE SOLICITOR: YOUR HONOR, I THINK *STATE VERSUS IVEY* IS ALSO ANOTHER CASE IN WHICH I THINK EVIDENCE WAS INTRODUCED ABOUT PAST CONVICTIONS OF THE DEFENDANT, PROBATION, PAROLE, THINGS OF THAT NATURE, EARLY RELEASE. THE SUPREME COURT SAID THAT THAT DID NOT INDICATE FUTURE DANGEROUSNESS.

WHAT THEY'RE TALKING ABOUT, PAST INCIDENTS, THAT IN NO WAY IS PROOF OF ANY FUTURE DANGEROUSNESS WHEN IT'S SPECIFICALLY

BROUGHT OUT, WHICH WE HAVE NOT DONE, AND WE WILL NOT ARGUE ANYTHING ABOUT THE FUTURE DANGEROUSNESS TO THE PUBLIC AT WILL, SOCIETY AT WILL.

THE COURT: YES, SIR. I UNDERSTAND WHAT YOU ARE SAYING, SOLICITOR. OF COURSE, YOU KNOW, I THINK THAT THE KEY TO IT IS, OF COURSE, IN THE *SIMMONS* CASE IS WHEN THE STATE PUTS THE DEFENDANT'S FUTURE DANGEROUSNESS AT ISSUE AND THE STATE LAW PROHIBITS THAT PERSON'S RELEASE ON [2004] PAROLE, THEN DUE PROCESS REQUIRES THAT THE DEFENDANT BE ALLOWED TO BRING INELIGIBILITY TO THE JURY'S ATTENTION BY ARGUMENT OR BY COURT INSTRUCTION, OF COURSE. AND *SIMMONS* APPLIES ONLY WHERE BOTH PRONGS OF THE TEST ARE MET.

SO THE QUESTION FOR ME TO DETERMINE IS WHETHER OR NOT YOU HAVE RAISED THE FUTURE DANGEROUSNESS ISSUE. I DON'T KNOW THAT I THINK THAT YOU HAVE.

I'M GOING TO GO BACK AND THINK ABOUT IT FOR A FEW MINUTES AND I'M ALSO GOING TO ALLOW MY CLERK TO MAKE A COPY OF MY CHARGE FOR YOU AND THEN WE'LL GET STARTED. BUT I'LL ADVISE YOU SHORTLY.

———

[2007] **DISCUSSION OF REQUESTS TO CHARGE**

* * *

INSOFAR AS THE REQUESTS FOR CHARGE THAT HAVE BEEN SUBMITTED BY THE STATE AND THE DEFENSE, MS. FULLWOOD AND MR. KIRKLAND, THE ARGUMENT THAT YOU MAKE CONCERNING THE DEFENDANT'S REQUEST TO CHARGE NUMBER ONE, THE STATE – YOU MADE THE ARGUMENT THAT THE STATE HAS MADE FURTHER DANGEROUSNESS AN ISSUE IN THIS MATTER.

I DON'T BELIEVE THAT THE ISSUES THAT HAVE BEEN PRESENTED BY THE STATE INSOFAR AS THE TESTIMONY FROM THE PRISON GUARDS, ET CETERA ARE SUCH THAT CAUSES THIS COURT TO DETERMINE THAT FUTURE DANGEROUSNESS HAS BEEN MADE AN ISSUE. I THINK THOSE ARE ISSUES THAT GO TO THE DEFENDANT'S CHARACTER AND CHARACTERISTICS. AND AS A RESULT, I'M GOING TO DENY DEFENDANT'S REQUEST FOR CHARGE NUMBER ONE.

NOW, IF YOU DESIRE A PLAIN MEANING CHARGE, YOU [2008] KNOW, I'D CERTAINLY CHARGE THAT.

MS. FULLWOOD: WELL, YOUR HONOR, I WANT THE RECORD TO BE CLEAR –

THE COURT: YES, MA'AM.

MS. FULLWOOD: – OF COURSE, AND I THINK IT IS. THAT WE WOULD ASK YOUR HONOR TO CHARGE THE LANGUAGE CONTAINED IN OUR REQUEST TO CHARGE NUMBER ONE.

THE COURT: YES, MA'AM. I HAVE DENIED THAT ONE.

MS. FULLWOOD: I UNDERSTAND THAT. BUT ONLY IN LIGHT OF YOUR RULING ON THAT REQUEST TO CHARGE WOULD I ASK FOR A PLAIN AND ORDINARY MEANING CHARGE AND I WANT – WOULD LIKE TO ASK THE COURT TO CHARGE THE COURT OUT OF *NORRIS* THAT LANGUAGE ONLY. IN OTHER WORDS, THE TERMS –

THE COURT: LIFE MEANS LIFE AND DEATH MEANS DEATH. PERIOD.

MS. FULLWOOD: YES, SIR.

THE COURT: YES, MA'AM.

MS. FULLWOOD: IN ADDITION, YOUR HONOR –

THE COURT: THE ONLY WAY THAT I CHARGE ANYTHING ELSE IS IF THE JURY HAS A QUESTION.

MS. FULLWOOD: IN ADDITION, YOUR HONOR, IN LIGHT OF YOUR RULING ON MY FIRST REQUEST TO CHARGE –

THE COURT: YES MA'AM.

MS. FULLWOOD: – I WOULD ASK YOU TO CONSIDER THIS SUPPLEMENTAL REQUEST TO CHARGE.

[2009] MR. HUMPHRIES: GLAD TO BE HEARD AT ANY TIME, YOUR HONOR.

THE COURT: YES, SIR.

BE GLAD TO HEAR FROM YOU.

MR. HUMPHRIES: PROPOSED CHARGE NUMBER TWO SUBMITTED BY THE DEFENSE IS A CHARGE ON THE FACTS AND AS SUCH, WE WOULD OBJECT TO IT.

THE COURT: HAVE YOU GOT ANY KIND OF A CASE THAT YOU CAN CITE ME TO THAT THIS COMES FROM, MS. FULLWOOD?

MS. FULLWOOD: NO, YOUR HONOR. IT'S SIMILARLY IN LIGHT OF THE FACT THAT THE STATE HAS SAID AND YOUR HONOR HAS RULED THAT THEY HAVEN'T PUT FUTURE DANGEROUSNESS IN ISSUE. FOR THAT REASON, I WANT A CHARGE TO THE JURY THAT, IN FACT, THE STATE HAS IN EFFECT STIPULATED THAT'S NOT AN ISSUE IN THIS CASE. I THINK IT'S NECESSARY IN LIGHT OF THE INFERENCES THAT CAN BE DRAWN FROM THE EVIDENCE THAT THE STATE ITSELF PUT BEFORE THE JURY.

THE COURT: NO, MA'AM. I DISAGREE WITH YOU. I'M GOING TO DENY DEFENDANT'S NUMBER ONE AND TWO AND ASK THAT THE COURT REPORTER MARK THOSE FOR THE RECORD.

(WHEREUPON, COURT'S EXHIBIT NUMBER SEVEN, DEFENDANT'S REQUESTS TO CHARGE, MARKED FOR THE RECORD AT THIS TIME.)

THE COURT: YES, MA'AM.

MS. FULLWOOD: YOUR HONOR?

[2010] THE COURT: YES, MA'AM.

MS. FULLWOOD: IN THAT REGARD, I WOULD ALSO MOVE AND I UNDERSTAND THE RESPONSIBILITY MR. KIRKLAND AND I HAVE DURING THE COURSE OF THE STATE'S CLOSING ARGUMENT, BUT I WOULD MOVE AT THE TIME TO EXCLUDE ANY REFERENCE, DIRECT OR INDIRECT, IN THE STATE'S FINAL ARGUMENT TO THE JURY FOR FUTURE DANGEROUSNESS.

THE COURT: WELL, I THINK THAT THAT HAS BEEN TAKEN CARE OF AND THE SOLICITOR HAS INFORMED THE COURT THAT HE DOESN'T INTEND TO ARGUE FUTURE DANGEROUS [sic].

IS THAT CORRECT, SOLICITOR?

THE SOLICITOR: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT.

* * *

[2011] MS. FULLWOOD: A FEW MATTERS, YOUR HONOR.

THE COURT: YES, MA'AM.

MS. FULLWOOD: FIRST OF ALL AND, JUDGE, I PROMISE I'M NOT TRYING TO BEAT A DEAD HORSE.

THE COURT: I UNDERSTAND.

MS. FULLWOOD: BUT I WANT AT THIS STAGE FOR THE [2012] RECORD TO BE CLEAR FOR

THE GROUNDS FOR MY REQUEST FOR MY FIRST REQUEST TO CHARGE –

THE COURT: YES, MA'AM.

MS. FULLWOOD: – IF I MAY, SIR?

IT'S BASED ON HIS DUE PROCESS RIGHT TO REBUT ANY FACT OR CONSIDERATION THAT WOULD TEND TO SUPPORT A SENTENCE OF DEATH AND WE BELIEVE THAT THROUGH THE EVIDENCE, THE STATE HAS PLACED IN THE RECORD IN ITS CASE IN CHIEF AND THROUGH THE MANNER IN WHICH IT HAS CROSS-EXAMINED OUR WITNESSES, THAT EVIDENCE IS NOW IN THE RECORD TO SUPPORT INFERENCES THAT HE MAY ESCAPE AND MAY BE A DANGER IN THE PRISON. ESPECIALLY OF BEING A DANGER TO – OF ESCAPE AND HURTING PEOPLE OUTSIDE THE PRISON WALLS. THE FACT THAT HE'S GOING TO BE IN PRISON FOR THE REST OF HIS LIFE, NEVER GOING ANYWHERE, WE CAN'T REBUT IT WITHOUT THAT CHARGE. *GARNER V. FLORIDA, SKIPPER V. SOUTH CAROLINA, SIMMONS*, ALL REQUIRE – THOSE LINE OF CASES REQUIRE THAT CHARGE IN THIS CASE.

IT ALSO – IT'S PRECLUDING US FROM PUTTING BEFORE THE JURY THE BASIS FOR A SENTENCE OF LESS THAN DEATH. IN OTHER WORDS, THE *LARKIN* (PHONETICALLY) PRINCIPLE.

FURTHERMORE, BY ALLOWING THAT TYPE OF EVIDENCE IN THE RECORD WITHOUT LETTING US EXPLAIN IT OR LETTING US GIVE THE JURY CORRECT INFORMATION AS TO THE TYPE OF SENTENCE

HE WILL ACTUALLY RECEIVE, IF HE RECEIVES A SENTENCE OF LIFE [2013] IMPRISONMENT, IT'S ALLOWING THE JURY OR IS ALLOWING THE STATE TO PROJECT INTO THESE PROCEEDINGS ARBITRARY AND CAPRICIOUS FACTORS THAT MIGHT LEAD TO IMPOSITION OF THE DEATH PENALTY AND, OF COURSE, OUR STATE CONSTITUTION HAS CORRESPONDING PROVISIONS THAT DEMAND THAT THESE PRINCIPLES CF LAW BE FOLLOWED.

THE COURT: DOES THE STATE WANT TO ADDRESS THAT AT ALL?

MR. HUMPHRIES: NO, SIR.

THE COURT: ALL RIGHT.

I UNDERSTAND YOUR MOTION. I THINK THAT THE RECORD IS CLEAR. IT'S DENIED.

[2024] **CLOSING ARGUMENTS BY THE SOLICITOR**

* * *

AWAY FROM. WE ARE ALL HUMAN BEINGS. REGARDLESS OF HOW WELL TRAINED THE PRACTITIONERS ARE, WE ARE DEALING WITH HUMAN BEINGS THAT ARE HERE IN COURT AND HAVE BEEN BROUGHT HERE BECAUSE OF CIRCUMSTANCES THAT HAVE EXISTED OVER WHICH NONE OF US HAVE ANY CONTROL.

AND HAVING SAID THAT, THE MOTION IS DENIED.

MR. KIRKLAND: THANK YOU.

LET'S BRING THEM BACK, PLEASE.

(JURY IN.)

THE COURT: THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

ALL RIGHT, SOLICITOR.

THE SOLICITOR: MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, AT THIS POINT, YOU HAVE HEARD ALL OF THE TESTIMONY THAT YOU ARE GOING TO HEAR IN *THE STATE VERSUS WILLIAM ARTHUR KELLY*.

AND RIGHT UP FRONT, I'M GOING TO JOIN EVERYONE IN THIS COURTROOM, THE JUDGE, THE DEFENSE ATTORNEYS, EVERYONE ASSOCIATED WITH THIS CASE IN THANKING YOU. THIS CASE HASN'T LASTED THAT LONG. IT'S BEEN A RELATIVELY QUICK CASE, BUT THE WITNESSES THAT HAVE BEEN PRESENTED, YOU HAVE GIVEN THEM YOUR UNDIVIDED ATTENTION AS YOU SHOULD HAVE AND WE APPRECIATE IT. THERE ARE OVER 120 ODD PIECES OF EVIDENCE. IT'S A LARGE VOLUME. I KNOW YOU HAVE GIVEN THAT YOUR UNDIVIDED ATTENTION, CONSIDERATION AND YOU CONTINUE TO [2025] DO SO. AND WE'RE AT THAT POINT WHERE I TOLD YOU LAST NIGHT THERE'S ONE MORE THING WE HAVE TO DO. THERE'S ONE MORE DECISION WE HAVE TO MAKE. THERE'S ONE MORE DUTY TO PERFORM.

THE JUDGES AROUND THE STATE, INCLUDING JUDGE CLARY, FREQUENTLY TELLS JURORS THAT

YOU KNOW – AND I THINK WINSTON CHURCHILL SAID THIS, IN PEACETIME, THE MOST IMPORTANT SERVICE YOU CAN RENDER IS SERVING ON A JURY. AND YOU HAVE FULFILLED THAT OBLIGATION, THAT DUTY, IN A MOST EXEMPLARY MANNER. AND CARRYING OUT THAT DUTY AND REACHING THAT ONE FINAL DECISION, I KNOW IT'S DIFFICULT. I KNOW THIS IS NOT AN EASY THING. I KNOW THIS IS AN EMOTIONAL POINT AND IT SHOULD BE BECAUSE WE ARE ASKING FOR THE ULTIMATE AND IT IS WARRANTED, FOLKS. IT IS THE PUNISHMENT THAT FITS THE CRIME.

AND YOU KNOW YOU WERE ASKED, ALL OF YOU, AS YOU SAT IN THAT CHAIR, NOW, YOU DON'T KNOW WHAT THE OTHER JURORS WERE ASKED, BUT EVERY ONE OF YOU WERE ASKED, IN THE APPROPRIATE CIRCUMSTANCES, IF THE PUNISHMENT FITS THE CRIME, COULD YOU VOTE FOR THE DEATH PENALTY AND EVERY ONE OF YOU SAID YES. AND IS THIS NOT THE CASE? IS THIS NOT THE CRIME FOR IT TO FIT? IT'S UP TO YOU TO DECIDE. THAT'S YOUR DECISION.

I TOLD YOU IT WASN'T GOING TO BE PRETTY. EVEN TELLING YOU THAT, I KNOW YOU COULDN'T ANTICIPATE THE [2026] PAIN, THE ABUSE, THE TORTURE ONE HUMAN BEING COULD INFLICT ON ANOTHER. THAT MURDERER COULD INFLICT ON A PERSON WHO WAS HIS MOTHER'S FRIEND. BUT HE DID IT.

YOU WERE ALSO ASKED ABOUT AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES AND THAT'S STRANGE TERMS PARTICULARLY IN THE LEGAL SENSE.

NOW, JUDGE CLARY IS GOING TO TELL YOU IN MORE DETAIL ABOUT THAT. HE WILL TELL YOU ABOUT AN AGGRAVATING CIRCUMSTANCE, MAKING A CRIME WORSE. CAN THIS BE MADE ANY WORSE? CAN THIS BE ANYMORE HORRIBLE THAN WHAT IT IS? THAT'S FOR YOU TO DECIDE. AND HE WILL TELL YOU ABOUT THE MITIGATING CIRCUMSTANCES, TO LESSEN THE SEVERITY OR CULPABILITY OF THE CRIME. IS THERE ANYTHING, ANYTHING THAT CAN LESSEN THIS?

I TOLD YOU LAST NIGHT THAT WE WERE RELYING ON FIVE AGGRAVATING CIRCUMSTANCES. YOU WILL HAVE THESE IN WRITING IN THE JURY ROOM. JUDGE CLARY IS GOING TO GIVE THEM TO YOU.

I ALSO TOLD YOU WE ONLY HAD TO PROVE ONE FOR YOU TO IMPOSE THE DEATH PENALTY, BUT HAVEN'T WE PROVED ALL FIVE TO YOU, FOLKS. THERE'S NO DOUBT. WE ONLY HAVE TO PROVE IT TO A REASONABLE DOUBT, BUT THERE IS NO DOUBT. THAT AT THE K.F.C. ON JANUARY THE 5TH, 1996, THAT FRIDAY NIGHT, WHEN THAT MURDERER WAS CARRYING OUT HIS PLAN, PUTTING IT INTO FRUITION, SURROUNDING THAT TIME AND PLACE AND MURDER, THESE [2027] ACTS, THESE CRIMES WERE ALSO COMMITTED.

KIDNAPPING. YOU HAVE ALREADY FOUND THAT TO BE TRUE. HE WAS IN THE BACK OF THIS

CAR, FOLKS. HE WAS IN THAT BACK-SEAT THERE. NOT ONLY THAT, INSIDE THAT STORE, HE CONFINED HER. HE RESTRAINED HER. HE TOOK HER FREEDOM AWAY WHEN HE TAPED HER HANDS AND TAPED HER TO THAT CHAIR. THERE'S NO DOUBT ABOUT KIDNAPPING.

BURGLARY, GOING INTO A BUILDING WITHOUT LAWFUL AUTHORITY, WITHOUT CONSENT. WELL, SHIRLEY MIGHT HAVE LET HIM IN, BUT IT WASN'T VOLUNTARILY OR WILLINGLY BECAUSE HE EITHER HAD THIS KNIFE AT HER NECK OR MAYBE AT HER STOMACH. THAT'S ENTERING WITHOUT CONSENT WITH A DEADLY WEAPON, A KNIFE. HE USED IT TO INFLICT PHYSICAL PAIN. HE DISPLAYED IT. IT WAS DURING THE NIGHTTIME. THERE'S NO DOUBT IT'S A BURGLARY. THE STORE HAD ALREADY CLOSED. IT WAS NO LONGER OPEN TO THE PUBLIC AND HIM.

NUMBER THREE, ROBBERY WHILE ARMED WITH A DEADLY WEAPON. YOU HAVE ALREADY FOUND THAT. ROBBERY. A DEADLY WEAPON. YOU HAVE ALREADY FOUND THAT.

LARCENY WITH THE USE OF A DEADLY WEAPON SIMILAR TO ARMED ROBBERY. STEALING THINGS, CARRYING AWAY WITH THE USE OF A DEADLY WEAPON.

AND LASTLY, AND I TOLD YOU PROBABLY THE MOST IMPORTANT ONE, CERTAINLY THE MOST GRUESOME, PHYSICAL TORTURE. DID HE NOT TORTURE SHIRLEY SHEALY?

[2028] YOU HEARD THAT FELLOW LAST NIGHT, WITH ALL OF THOSE DIAGRAMS ON THAT SCREEN SHOWING YOU THE BLOOD AND ALL THE CONVERGENCE POINTS AND THE STREAKING AND THE SPATTERING.

PHYSICAL TORTURE THE JUDGE IS GOING TO TELL YOU IS THE PHYSICAL ABUSE OF ANOTHER PERSON. AGGRAVATED BATTERY. YOU DON'T THINK THAT WAS AGGRAVATED? YOU DON'T THINK THAT WAS BATTERY? IT WASN'T SIMULTANEOUS DEATH. THE DOCTOR TOLD YOU THAT. IT WAS PROLONGED, INTENTIONAL, UNMERCIFUL, INTENTIONAL INFLICTION OF SEVERE PAIN AND ABUSE TO ANOTHER PERSON. DON'T YOU KNOW THAT SHIRLEY WAS FIGHTING FOR HER LIFE IN THERE.

FROM THE FIRST MOMENT IN THAT OFFICE ON DON'T YOU KNOW SHE WAS FIGHTING. BUT HE WOULDN'T TAKE NO FOR AN ANSWER. HE WAS CARRYING OUT HIS PLAN. HE HAD IT MAPPED OUT BETTER THAN BRAD SCOTT EVER PUT TOGETHER A FOOTBALL PLAN. AND HE CERTAINLY CARRIED IT OUT BETTER THAN THE GAMECOCKS CAN. HE WAS A MASTER MURDERER. AND NOT INSTANTANEOUS, BUT PROLONGED, UNMERCIFUL, SEVERE PAIN AND ABUSE. ALL WE'VE GOT TO DO IS PROVE ONE.

THE JUDGE IS GOING TO TELL YOU, FOLKS, IF YOU FIND ONE OR MORE; YOU CAN FINE [sic] ONE, TWO, THREE, FOUR, FIVE, ANY COMBINATION OF THEM, YOU MAY CONSIDER IMPOSING THE DEATH PENALTY. ———

FIVE STATUTORY AGGRAVATING CIRCUMSTANCES IN THIS [2029] CASE. FIVE.

HE'S GOING TO TELL YOU ABOUT MITIGATING CIRCUMSTANCES. THESE ARE THINGS IN FAVOR OF THE DEFENDANT. AND YOU WILL HAVE THIS IN YOUR JURY ROOM IN WRITING.

THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON. YOU GIVE THAT WHAT WEIGHT YOU THINK IT SHOULD.

THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME BECAUSE HE WAS BELOW THE AGE OF EIGHTEEN AT THE TIME OF THE CRIME.

THAT'S THINGS IN HIS FAVOR.

NO PRIOR CONVICTIONS OF VIOLENCE AGAINST ANOTHER PERSON; BELOW THE AGE OF EIGHTEEN. YOU KNOW SOMETHING, A PERSON THAT COMMITS AN UNCHARACTERISTIC AND AN UNPREDICTABLE CRIME IS MORE FRIGHTENING THAN A SERIAL KILLER, MORE FRIGHTENING THAN A CAREER CRIMINAL. IS THAT PERSON UN-CHARACTERISTICALL [sic], BECAUSE HE HADN'T DONE IT BEFORE? YOU KIND OF TRUST THEM A LITTLE BIT.

UNPREDICTABLY BECAUSE OF HIS AGE. YOU DON'T THINK THEY WILL DO ANYTHING. THOSE PEOPLE ARE SUPPOSED TO BE KIND, SUPPOSED TO BE YOUR FRIEND, SUPPOSED TO BE NICE; SUPPOSED TO BE KIND. WELL, THAT'S THE KIND THAT WHILE THEY ARE HUGGING YOU WITH KINDNESS, THEY'RE

GETTING READY TO KILL YOU WITH KINDNESS. DOES THAT GO IN HIS FAVOR –

[2030] MR. KIRKLAND: OBJECTION, YOUR HONOR –

THE COURT: YES, SIR.

MR. KIRKLAND: – INFLAMMATORY.

THE COURT: OVERRULED.

THE SOLICITOR: DOES THAT GO IN HIS FAVOR?

YOU REMEMBER HE HAD THAT SHANK BEHIND HIS BACK WHEN THAT LADY, THE ONE MOST VULNERABLE DOWN AT THE LEXINGTON COUNTY JAIL, WHICH BY THE WAY IS WORSE THAN THE PRISONS THEY SAY – THAT FELLOW SAID TODAY. KILL THEM WITH KINDNESS.

OH, HE DOESN'T HAVE A PRIOR RECORD. THE LAW DOESN'T SAY YOU HAVE TO KILL, KILL, STEAL, STEAL AND ROB BEFORE THE DEATH PENALTY IS INVOLVED. ISN'T THIS BAD ENOUGH ON ITS OWN?

HE WAS GOING TO KILL. IT WAS JUST A MATTER OF WHEN. WHETHER IT WAS 17, 27, OR 37. BUT IF YOU WANT TO GIVE HIM SOME BENEFIT OF THE DOUBT, IF YOU WANT TO GIVE HIM LENIENCY, THEN YOU WRITE OUT LIFE. IF THAT'S WHAT THIS CRIME CALLS FOR. IT'S UP TO YOU.

AND THE JUDGE IS GOING TO SAY EVEN IF YOU DON'T FIND ANY OF THESE MITIGATING CIRCUMSTANCES AND YOU FIND ALL OF THOSE AGGRAVATING CIRCUMSTANCES, YOU CAN IMPOSE A LIFE SENTENCE FOR ANY REASON OR NO REASON.

FOLKS, IF YOU WANT TO RETURN A LIFE SENTENCE IN THIS CASE, IT WOULD BE FOR NO REASON AT ALL. WE'RE JUST [2031] WASTING OUR TIME. WE SHOULD HAVE DONE IT WHEN WE STARTED OFF MONDAY IF THAT'S THE APPROPRIATE SENTENCE. IT'S UP TO YOU. I KNOW IT'S NOT AN EASY DECISION. I KNOW IT'S DIFFICULT.

I'M GOING TO BE THE LAST PERSON THAT SPEAKS TO YOU ON BEHALF OF THE STATE, ON BEHALF OF THE VICTIM BECAUSE THEY SPEAK LAST. THE DEFENDANT IS EVEN GOING TO HAVE A CHANCE TO SPEAK TO YOU. HE'S GOING TO TALK TO YOU.

MERCY. YOU ARE GOING TO HEAR SOME CRIES FOR MERCY.

WHEN THEY ARE UP THERE TALKING, YOU THINK TO YOURSELF, WHERE WAS THAT MERCY AT THE K.F.C. ON FRIDAY, JANUARY THE 5TH, 1996? WHERE WAS THAT MERCY WHEN HE WAS TYING SHIRLEY SLADE SHEALY'S HANDS BEHIND HER BACK? WHERE WAS THAT MERCY WHEN HE WAS TYING HER LEG TO THE CHAIR? WHERE WAS THAT MERCY WHEN SHE WAS FIGHTING HIM OFF? WHERE WAS THE MERCY WITH THESE STABS WOUNDS? DON'T THINK ABOUT THEN. DON'T THINK ABOUT THEN. THINK ABOUT NOW. LET'S GIVE HIM MERCY.

IF THAT'S APPROPRIATE, IF THAT'S JUSTIFIED, WRITE IT OUT IN BIG BOLD LETTERS, LIFE FOR THIS CRIME.

YOU KNOW, I TOLD YOU LAST NIGHT AT 6 O'CLOCK WHEN WE STARTED OFF, HE ALREADY HAD HIS THINGS, HE ALREADY HAD HIS PLAN LINED UP. YOU HEARD THESE CAME FROM MCDONALD'S WHERE HE WORKED OR A SIMILAR KIND. IT WASN'T IN THE [2032] KENTUCKY FRIED CHICKEN, THE TAPE. THE KNIFE, IT WASN'T IN THE KENTUCKY FRIED CHICKEN. HE BROUGHT THOSE THINGS.

AND, YOU KNOW, WHEN THEY'RE TALKING ABOUT AGE, THINK ABOUT THESE OBJECTS IN HIS HANDS. AND WHEN YOU TALK ABOUT AGE AND YOU'RE TALKING ABOUT PHYSICAL TORTURE, THINK OF THE DIFFERENT SIZES. THE JUDGE WILL TELL YOU ABOUT THAT, OF THE TWO, THE DIFFERENT SEX, AND THINK OF THE DIFFERENT CONDITIONS. WHY IN THE WORLD WOULD HE PLAN TO MURDER AND NOT ONLY HIS MOTHER'S BEST FRIEND, NOT ONLY SUPPOSEDLY HIS FRIEND, BUT A PREGNANT WOMAN –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: I NOTE YOUR OBJECTION. IT'S OVERRULED.

THE SOLICITOR: WHY WOULD HE WANT TO MURDER A PREGNANT WOMAN? DID IT MAKE ANY DIFFERENCE THAT SHE WAS 25 AND HE WAS

17? SHE'S NO LESS DEAD. SHE'S NO LESS SIX FEET DOWN. THE ONLY THING THEY SAY IS WORSE THAN THAT IS KILLING A CHILD. WELL, DIDN'T HE DO THAT, TOO.

MS. FULLWOOD: OBJECTION, YOUR HONOR. THAT'S NOT THE LAW.

THE COURT: SUSTAIN THE OBJECTION :

THE SOLICITOR: DID SHIRLEY –

THE COURT: – PLEASE DISREGARD THAT, LADIES AND GENTLEMEN.

THE SOLICITOR: DID SHIRLEY HAVE THAT BABY? DID [2033] THAT BABY PERISH WITH HER? THAT'S FOR YOU TO DECIDE. BUT IF YOU THINK THAT'S IN HIS FAVOR, YOU GIVE IT THE WEIGHT, FOLKS, THAT YOU THINK IT DESERVES.

YOU KNOW WHEN SHIRLEY LEFT THAT NIGHT AND MS. ADAMS SAW HER LEAVING, I TOLD YOU BEFORE SHE HAD NO IDEA HOW HORRIBLE THE LAST TWENTY MINUTES OF HER LIFE WOULD BE. CAN YOU IMAGINE WITH HER IN THAT CAR AND IT [sic] DARK AND SHE'S RIDING AND GOING HOME AND A KNIFE COMES TO HER THROAT IN THE BACK OF THE CAR. YOU HEAR WHAT HE SAID. I CAN'T GET IN MY CAR ANYMORE. I'M LOOKING AROUND. I DON'T TRUST PEOPLE ANYMORE. AND GOING INTO THAT STORE, GOING INTO THE K.F.C., WHERE ALL WAS THAT KNIFE POINTED ON HER? WHO ALL WAS SHE THINKING ABOUT? WHAT WERE HER CONCERNS WHEN THAT TAPE RIPPED OFF OF THAT ROLL AND SHE HEARD IT TIGHTENING AROUND

HER HANDS. AND LOOK AT HER HANDS HOW WHITE THEY ARE. YOU CAN LOOK AT SOME OF THOSE AUTOPSY PICTURES AND YOU CAN STILL SEE THE LIGATURE MARKS FROM WHERE THAT TAPE WAS TIED AROUND HER.

WHAT ARE THE PAINS SHE FELT, WHAT ARE THE STINGING SENSATIONS WHEN THIS KNIFE RIPPED THROUGH HER THROAT? IT'S ON THE OTHER SIDE OF THIS EXHIBIT. WONDER HOW IT FELT WHEN IT CUT HER VOCAL CORDS AND SHE NO LONGER COULD SCREAM. SHE NO LONGER COULD TALK. SOMEWHERE IN THERE, SHE THREW UP. SHE WAS BREATHING THROUGH HER THROAT. YOU RECKON HER MOUTH WAS MOVING. YOU RECKON SHE WAS TRYING [2034] TO YELL FOR HELP. AS HER HANDS WERE BEHIND HER BACK AND HER THROAT IS CUT, DO YOU RECKON THAT SHE'S SAYING, OH, GOD, HELP ME, SOMEBODY, BUT SHE COULDN'T.

MERCY. IS THAT MERCY? WAS THAT MERCY?

WHY WOULD HE HACK HER IN THE BACK OF THE HEAD? AND WHEN SHE CAN'T SCREAM, THE ONLY THING SHE COULD DO WAS THROW UP. YOU REMEMBER THE DOCTOR, THE ONLY THING SHE COULD DO WAS THROW UP. BECAUSE IT WAS UP TOP, NOT IN THE BOTTOM. YOU RECKON SHE WAS THROWING UP AND TRYING TO YELL, TRYING TO PLEAD FOR MERCY. WOULD HE LISTEN? BUT HE WANTS YOU TO LISTEN NOW.

WHERE WAS THE MERCY WHEN THAT SAME NIGHT, AFTER CUTTING HER THROAT TWICE, DUG INTO THE SIDE OF HER NECK. YOU CAN SEE THE

FATTY TISSUE RIGHT THERE THE STINGING SENSATION, THE PAIN, THE TORTURE. WONDER WHAT SHE WAS THINKING ABOUT, FOLKS? YOU RECKON SHE HAD SIDNEY BRUCE ON HER MIND? WHAT WAS GOING THROUGH THAT YOUNG WOMAN'S MIND?

WHY WOULD HE WANT TO STAB HER UNDER HER BREASTS, THE TOP OF HER BREASTS, DOWN THE SIDE? IS THAT MERCY? IS THAT FOR A LIFE SENTENCE? HOW COULD YOU DO THIS TO ANOTHER HUMAN BEING? HOW COULD YOU INFLICT THAT TO A ANOTHER HUMAN BEING, MORE LESS SOMEBODY YOU KNOW, MORE LESS SOMEBODY WHOSE GOT A CHILD THAT'S FIVE OR SIX-YEARS OLD –

MS. FULLWOOD: OBJECTION, YOUR HONOR –

THE SOLICITOR: – AND IS PREGNANT.

[2035] THE COURT: NOTE YOUR OBJECTION.

THE SOLICITOR: A FIVE OR SIX-YEAR-OLD CHILD AT HOME AND HE KNOWS THAT SHE'S PREGNANT AND HE KNOWS HER, HOW CAN YOU DO THAT TO ANOTHER HUMAN BEING? AND IF YOU WANT TO GIVE HIM MERCY, IF THEY SAY IT, PLEASE GIVE HIM MERCY FOR THAT. HOW CAN YOU DO THAT? HE DID IT. AND YOU KNOW SOMETHING. ONE OF THE MOST, PROBABLY HUMILIATING MOST OF ALL – AND YOU'VE GOT THESE PANTS, YOU'VE GOT THESE SHIRTS. YOU SEE ALL OF THESE STAB WOUNDS. HE EVEN CUT HER BRA UNDER HER AND RIGHT UNDER THESE PANTS BACK HERE, YOU SEE THAT. YOU SEE THAT. SHE HAD TO BE STABBED

WHEN SHE WAS LYING DOWN BECAUSE THAT WENT STRAIGHT IN UNLESS HE DID THAT. AND THEN THE ONE RIGHT HERE. HE WOULD HAVE TO COME UP FROM THE FLOOR TO STAB HER UNLESS HE STABBED HER WHILE SHE WAS DOWN. STABBING HER WHILE YOU'RE DOWN. KICK HER WHILE YOU'RE DOWN. KEEP ON PLUNGING, KEEP ON SLICING, HACKING, BLOODY BILLY, THE BUTCHER OF BATESBURG –

MR. KIRKLAND: OBJECTION TO THE INFLAMMATORY NATURE, YOUR HONOR –

THE COURT: JUST A –

MR. KIRKLAND: OBJECTION TO THE INFLAMMATORY NATURE OF THAT ARGUMENT.

THE COURT: OVERRULED.

THE SOLICITOR: BLOODY BILLY AND THE BUTCHER OF BATESBURG AND HE WANTS MERCY –

[2036] MR. KIRKLAND: OBJECTION TO THE REFERENCE OF –

THE COURT: JUST ONE MOMENT, SOLICITOR.

MR. KIRKLAND: OBJECTION TO THE REFERRAL AS BLOODY BILLY.

THE COURT: I'LL SUSTAIN THE OBJECTION AND ASK THAT THE JURY DISREGARD THAT STATEMENT. THAT IT BE STRICKEN FROM THE RECORD.

THE SOLICITOR: THEY CALL HIM BILLY. LET ME SHOW YOU SOMETHING, FOLKS. WHAT DO YOU

SEE IN THESE PICTURES? DOES THAT CONNECT THE TWO? BUT THEY WANT YOU TO THINK OF HIM AS LITTLE BILLY. LITTLE BILLY, THE KID. I KNOW ANOTHER BILLY, THE KID, THAT HE REMINDS ME OF. HE'S NOT A KID, HE'S A KILLER. AND HE COMMITTED A MAN-SIZED CRIME AND HE NEEDS A MAN-SIZED PUNISHMENT. THAT'S WHAT WE ARE DEALING WITH. AND HE BUTCHERED HER. THERE'S NO DOUBT ABOUT IT. AND HE'S FROM BATESBURG. SO IF YOU WANT TO PUT THOSE TWO TOGETHER, YOU SAY IT IF I CAN'T, THE BUTCHER OF BATESBURG.

MR. KIRKLAND: OBJECTION, AGAIN, YOUR HONOR.

THE SOLICITOR [sic]: SUSTAIN THE OBJECTION.

THE SOLICITOR: THAT'S WHAT HE IS.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, PLEASE DISREGARD THE SOLICITOR'S COMMENT. IT IS STRICKEN FROM THE RECORD.

THE SOLICITOR: AND HE DID IT WITH HIS FAVORITE [2037] TOOL. THIS IS WHAT HE LOVES. THIS IS WHAT HE WANTS. THIS IS HIS PARTNER. THIS IS HIS FRIEND. TO GET WHAT HE REALLY WANTS. YOU KNOW, HE ONLY ENDED UP WITH LESS THAN ABOUT 150 DOLLARS. THIS IS MONEY THAT WAS FOUND. YOU REMEMBER SHE HAD 102 DOLLARS STILL STUCK TO HER BODY WHEN SHE WAS AT THAT AUTOPSY IN NEWBERRY. OVER A THOUSAND LEFT ON THE FLOOR BECAUSE THAT POLICE OFFICER HAPPENED BY.

MERCY? MITIGATION? IF YOU FIND IT, FOLKS, SPEAK IT OUT FOR WHAT HE'S DONE. AND, YOU KNOW WHAT, WHAT DID HIS OWN WITNESS SAY. HE DOESN'T HAVE ANY MENTAL ILLNESS. HE'S INTELLIGENT. HE'S NOT RETARDED. HE'S QUICK-WITTED. DOESN'T THAT MAKE SOMEBODY A LITTLE MORE DANGEROUS –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: JUST A MOMENT. YES, MA'AM. STATE YOUR GROUNDS.

MS. FULLWOOD: THE SOLICITOR HAS STIPULATED DANGEROUSNESS IS NOT AN ISSUE –

THE SOLICITOR: – FOR THIS LADY, THIS CRIME ON JANUARY THE 5TH, DOESN'T THAT MAKE HIM MORE UNPREDICTABLE FOR SHIRLEY SHEALY. WHEN YOU LET YOUR GUARD DOWN AND THEY STAB YOU IN THE BACK. THAT'S WHAT WE HAVE HERE. THAT'S WHAT WE DO KNOW. THAT'S WHAT HE DID. HE MADE HIS OWN MOTHER ADMIT THAT. HE MADE HIS OWN FAMILY VICTIMS.

YOU KNOW IT KIND OF SOUNDS FROM THE EVIDENCE THAT WHAT WE DID AT KENTUCKY FRIED CHICKEN WITH SHIRLEY IS KIND [2038] OF LIKE TOYING WITH HER, IT'S KIND OF LIKE GOING FROM ONE PLACE TO ANOTHER. IT'S KIND OF BATTING IT BACK AND FORTH. DOES THAT SHOW YOU GOOD CHARACTER? AND WE ARE TALKING ABOUT CHARACTER AND FITNESS. AND IF YOU SHOULD SEE ANYTHING IN HIS BACKGROUND FAVORABLE TO

HIM, GIVE HIM THE BENEFIT OF THE DOUBT. AND THEY SAY, OH, OH, IF Y'ALL SEND HIM TO PRISON, IT'S GOING TO BE HORRIBLE ON HIM. THEY'VE GOT BAD PEOPLE IN PRISON. THEY'VE GOT ALL KIND OF KILLERS OVER THERE. WELL, WHAT IS HE? IT'S GOING TO BE ROUGH ON HIM. BUT AT THE SAME TIME, THEY PUT UP TWO PEOPLE WHO SAID, YOU KNOW, WHAT, HE'S GOING TO ADAPT TO PRISON. WELL, WHICH IS IT? IS HE GOING TO LIKE IT OR IS IT GOING TO BE BAD? THEY SAID HE'LL ADAPT TO IT. SO IT SOUNDS LIKE HE'S GOING TO LIKE IT. YOU KNOW, HE EVEN TOLD SOMEBODY BROUGHT OUT TODAY, I'M LOOKING FORWARD TO GOING TO PRISON. I'M THERE TO MAKE MY NEW HOUSE, TO MAKE MY NEW ROOM. AND, YOU KNOW, WHAT THAT DOCTOR SAID, THE ONE THING I WAS IMPRESSED ABOUT HIM IS HE'S QUICK-WITTED. HE'S ABLE TO TALK HIMSELF OUT OF SITUATIONS AND THAT'S THE BEST PROTECTION YOU CAN HAVE IN PRISON. AND HE LEARNED FROM THE MASTER, HIS MENTOR, THAT GUY IN THE ORANGE SUIT THAT TESTIFIED LAST NIGHT. HE'S ALREADY A CON. BUT HE WANTS Y'ALL TO GIVE HIM LIFE FOR THAT.

A MONTH BEFORE HE'S COMING IN HERE TO FACE THE DEATH PENALTY, THERE'S A BLOCK OVER THERE THAT'S BEING [2039] EDGED OUT. THREE PEOPLE IN THE CELL. HE DIDN'T SAY, HEY, GUARDS, COME DOWN HERE, YOU BETTER GET THESE TWO FELLOWS BECAUSE THEY ARE GOING TO ESCAPE, THEY ARE TRYING TO BREAK OUT. I'M GOING ON TRIAL. NOW, LET ME TELL YOU, DID HE SAY THAT? OH, NO, HE DOESN'T HAVE ANYTHING TO DO WITH

IT AND THAT TOOTHBRUSH HE HAD WITH THE METAL TIP IN IT, OH, THAT'S JUST BEING A BIG MAN, TO CLEAN HIS FINGERNAILS. THAT'S NOT TO HURT ANYBODY, NOT MS. MARSHA PRICE, THE LADY EVERYBODY SAYS –

MR. KIRKLAND: OBJECTION, YOUR HONOR. HE'S – I THINK HE'S GOING AFIELD TO WHAT WE STIPULATED TO ON THE FUTURE PROBLEMS.

THE SOLICITOR: I AM TALKING ABOUT –

THE COURT: SOLICITOR, IF YOU WOULD, PLEASE LIMIT YOUR ARGUMENT TO WHAT WE DISCUSSED, SIR.

THE SOLICITOR: I AM TALKING ABOUT WHAT HAPPENED FROM THE WITNESSES WHO TESTIFIED ON THIS STAND. AND DIDN'T YOU HEAR A WOMAN NAMED MARSHA PRICE WHO WORKED AT THE LEXINGTON COUNTY JAIL. DIDN'T THEY SAY THAT SHE WAS THE ONE MOST GULLIBLE, THE ONE YOU COULD TAKE HOSTAGE? DIDN'T YOU HEAR HE HAD THAT SHANK BEHIND HIS BACK CALLING HER TO THE DOOR –

MS. FULLWOOD: OBJECTION, YOUR HONOR –

THE SOLICITOR: – IF YOU DIDN'T HEAR THAT, DISREGARD IT –

[2040] MS. FULLWOOD: – THIS IS GOING OUTSIDE THE SCOPE OF THE SITUATION –

THE COURT: OVERRULED –

MS. FULLWOOD: – STIPULATION –

THE COURT: OVERRULED.

THE SOLICITOR: IF YOU DIDN'T HEAR SOMEBODY TESTIFY TO THAT, FOLKS, YOU HOLD IT AGAINST ME AND NOT AGAINST THIS FAMILY OUT HERE, PLEASE. BUT I SWEAR I HEARD THAT FROM THE STAND. BUT YOU TAKE IT AS YOU HEARD IT. THAT'S JUST SHANKS WILL BE SHANKS. AND MURDERERS WILL BE MURDERERS. AND HE IS THE COLD-BLOODED ONE RIGHT OVER THERE.

WHAT DO THESE FOLKS HAVE TO TELL YOU OUT HERE? YOU RECKON MS. SHEALY STANDING UP AT THAT ALTAR ON HER WEDDING DAY, SHE WOULD REALIZE THAT WITHIN A FEW YEARS SHE WOULD BE BACK AT THAT CHURCH AGAIN IN A CASKET, AN UNBORN BABY IN HER ARMS.

MR. KIRKLAND: OBJECTION.

THE COURT: OVERRULED.

THE SOLICITOR: DIDN'T YOU HEAR THEM SAY THAT? DIDN'T YOU HEAR THE TESTIMONY? A HAPPY DAY. FAMILY MEMBERS, WEDDING DAY. RETURN TO THE SAME CHURCH ON JANUARY THE 8TH OF 1996, FOR THE LAST TIME. AT WHOSE HANDS? AT WHOSE BLOODY MURDERING HANDS? WELL, THEY WEREN'T BLOODY BECAUSE HE HAD HIS GLOVES ON. BUT HE MESSED UP BY LEAVING [2041] A TIP ON THIS TAPE. FAMILY PHOTOGRAPH. ALEX, THE BABY. YOU KNOW, THIS SISTER HERE, SHE'S EVEN HAD TO UNDERGO COUNSELING. I GOT SHIRLEY A JOB AT THAT KENTUCKY FRIED CHICKEN. I HAD ALWAYS PROTECTED HER

BECAUSE I WAS TWO YEARS OLDER. AND SHE IS BLAMING HERSELF. NOT EVEN HIM. SHE'S BLAMING HERSELF FOR HER SISTER BEING BUTCHERED TO DEATH. SHE'S GOT TO LIVE WITH THAT.

YOU HAVE HEARD EVERYBODY, EVERYBODY, SHIRLEY WAS JUST A PLEASURE TO BE AROUND. HAPPY, FILLED OUR LIVES. THE ONLY BAD THING I HEARD ANYBODY SAY ABOUT HER WAS THE DEFENDANT'S MOTHER AND SHE SAID SHE WAS A LITTLE SPACEY. WELL, THEY'VE CALLED ME WORSE THAN THAT, FOLKS. SHE WAS A LIFE. WHO STOPPED THAT?

THE LAST PHOTOGRAPH, THE LAST CHRISTMAS. YOU CAN SEE SHE'S PREGNANT IN THIS PICTURE.

MR. KIRKLAND: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

THE SOLICITOR: NO MORE CHRISTMASES; NO MORE CELEBRATIONS TOGETHER.

ALL THAT IS LEFT NOW ARE PICTURES AND MEMORIES AND A SON THAT REMINDS FAMILY MEMBERS OF HER WHEN THEY SEE ALEX.

AND THE LAST VALENTINE GIFT FROM HIM TO HER. WHAT DID THEY SAY? SIDNEY BRUCE LOOKED JUST LIKE [2042] ALEX WHEN ALEX WAS BORN. A FAMILY TOGETHER, WORKING HARD TO BUILD A FAMILY, TO BUILD A HOME, TO LEAD A HAPPY LIFE. ALL COMPLETELY DEVASTATED, COMPLETELY WIPED OUT BY HIM, BY HIM, BY THAT WITH THIS. NOT ONE TIME, NOT TWO TIMES, NOT THREE TIMES, YOU COUNT THEM WHEN YOU GO BACK THERE.

AND WHAT DOES MR. SLADE AND MR. SHEALY SAY? ALEX TALKS ABOUT HIS MOTHER ALL THE TIME. HE WANTS TO GO SEE HER GRAVE. THAT'S ALL HE HAS NOW. A HEADSTONE TO SPEAK TO, A MOUND OF DIRT. REMEMBER LITTLE ALEX AT THAT WEDDING GOING AROUND SAYING A BAD MAN KILLED MY MAMA. A BAD MAN KILLED MY MAMA.

IF THIS IS A CASE FOR LIFE, THAT'S YOUR DECISION, ALL TWELVE OF YOU COLLECTIVELY. IF THAT IS JUSTICE.

AND WHAT IS HE DOING? THEY WILL TELL YOU, YOU OUGHT TO GIVE HIM LIFE BECAUSE HE COOPERATED WITH THE POLICE IN MASSACHUSETTS. AND THEN THEY TELL YOU, WELL, HE LIED TO THEM. HE MADE UP LIES. BUT HE KNEW SHE WAS PREGNANT.

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

THE SOLICITOR: HIS CONFESSION OVER THERE IN HIS HANDWRITING SAYS THAT. SO YOU GIVE IT WHATEVER WEIGHT YOU WANT TO. NOT ONLY THAT, MS. BARBARA ADAMS TESTIFIED TO IT. YOU LISTEN TO THE EVIDENCE AND BASE IT ON THAT.

THEY WILL TELL YOU, OH, HAVE MERCY ON HIM. YOU [2043] WON'T HEAR ANYTIME, FOLKS – WHEN I SIT DOWN, YOU WON'T HEAR ANYTHING ABOUT FRIDAY, JANUARY THE 5TH OF 1996, AND YOU WON'T HEAR ANYTHING ABOUT THAT KNIFE

GOING INTO SHIRLEY SHEALY AND YOU WON'T HEAR ANYTHING ABOUT KIDNAPPING, ARMED ROBBERY, BURGLARY, LARCENY WITH A DEADLY WEAPON, PHYSICAL TORTURE. YOU ARE NOT GOING TO HEAR THAT BECAUSE ALL YOU ARE GOING TO HEAR IS, OH, GIVE HIM LIFE. GIVE HIM LIFE.

AND I TELL YOU, IF THAT'S WHAT YOU WANT TO DO, BUT IF THIS CASE IS NOT FOR THE DEATH PENALTY, IF IT'S NOT RIGHT HERE, IT'S NOT RIGHT.

THERE WAS A HAPPY HOME THAT THIS PERSON DESTROYED, BUT, YOU KNOW WHAT, HE'S GOING TO BE ALL RIGHT NOW. DID HE CONTINUE TO BRAG ABOUT IT? YOU KNOW HE CARRIED A CUP AROUND OVER THERE IN THE JAIL, HAD A CHICKEN ON IT WITH HIS HEAD CUT OFF, WITH BLOOD GOING DOWN IT SAYING K.F.C. AND HE SAID I TRIED TO CUT HER HEAD OFF, BUT I COULDN'T.

MERCY? I'M GOING TO CLOSE WITH SOME OF THE LAST TESTIMONY YOU HEARD. HE KILLED MY WIFE. HE KILLED MY BEST FRIEND. HE KILLED MY BABY. AND I CAN'T GO HOME. THEIR DREAMS WENT RIGHT DOWN THE DRAIN LIKE SHIRLEY'S BLOOD WENT DOWN THE DRAIN OF KELLY, THE BUTCHER. THIS IS THEIR DREAMS. LIKE THIS BLOOD GOING DOWN THE DRAIN, MR. KELLY BUTCHERED SHIRLEY SHEALY. HE TURNED THIS [2044] INTO THIS. HE TOOK A HAPPY HOME /AND DEVASTATED IT. HE TOOK A WIFE AND A BEST FRIEND AND A MOTHER AND AN UNBORN CHILD BECAUSE OF THIS.

WE ARE ASKING FOR THE DEATH PENALTY. WE ARE SEEKING THE DEATH PENALTY AND WE EXPECT THE DEATH PENALTY. YOU REMEMBER WHAT ALEX HAS LEFT ON CHRISTMAS TO LEAVE SOME PRESENTS AT THE GRAVE AND TO GO BY AND PUT A LIFESAVER ON A MOUND OF DIRT HOPING THAT MY MAMA GETS IT.

FOLKS, IF YOU DON'T GIVE HIM THE DEATH PENALTY, ANYTHING LESS WILL BE THE FINAL STAB TO THE MEMORY OF SHIRLEY AND SIDNEY BRUCE.

[2049] **CLOSING ARGUMENTS BY THE DEFENSE**

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I DIDN'T MAKE THESE UP, FOLKS. THIS ISN'T JUST ME OR THE DEFENSE TEAM DRAWING THESE THINGS OUT OF THE AIR. THESE ARE CIRCUMSTANCES THAT OUR GENERAL ASSEMBLY CONSIDERED TO BE SIGNIFICANT ENOUGH TO HAVE JURIES CONSIDER AS MITIGATING, AS BEING IN FAVOR OF LIFE. AND IT'S EASY TO UNDERSTAND WHY. THE AGE, THE FACT OF NO PRIOR RECORD. I'M NOT TRYING TO MAKE AN EXCUSE FOR YOU. BUT PEOPLE SEE THINGS DIFFERENT WHEN THEY ARE YOUNGER. PEOPLE REACT DIFFERENT WENT [sic] THEY ARE YOUNGER. OUR GENERAL ASSEMBLY KNOWS THAT. IT ALSO KNOWS THAT WITH A YOUNG PERSON, WITH A PERSON WITH NO PRIOR

CRIMINAL RECORD, THE CHANCE OF REHABILITATION IS GREATER AND I'M NOT TALKING ABOUT REHABILITATION IN THE SENSE OF A WIFE AND A KID AND A CAR. THAT'S NEVER GOING TO HAPPEN, EVER, FOR BILLY KELLY. BUT IT DOES MEAN THAT HE IS CAPABLE OF LEADING A PEACEFULLY, NONVIOLENT LIFE WITHIN THE CONFINES OF AN INSTITUTION. SO HIS AGE AT THE TIME OF THE CRIME; THE FACT THAT HE WAS UNDER EIGHTEEN AT THE TIME OF THE CRIME; AND THE FACT THAT HE HAS NO PRIOR CRIMINAL RECORD ARE THINGS THAT OUR LAW SAY ARE MITIGATING AND THESE ARE THINGS YOU CAN CONSIDER AND THESE ARE THINGS YOU NEED TO CONSIDER BEFORE YOU MAKE UP YOUR MIND ABOUT WHAT IS THE RIGHT PUNISHMENT IN THIS CASE. I MEAN, LET'S MAKE IT CLEAR. WE ARE TALKING ABOUT PUNISHMENT. WE [sic] NOT TALKING ABOUT BEING SOFT OR HARD, EASY OR STRICT. WE ARE TALKING ABOUT PUNISHMENT, TWO VERY SEVERE PUNISHMENTS.

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[2050] IN THIS CASE, WE HAVE OFFERED SEVERAL. WE PUT UP EVIDENCE FOR YOU TO SEE THAT BILLY KELLY IS CAPABLE OF ADAPTING WELL TO LIFE IN AN INSTITUTION, TO DEMONSTRATE THAT HE WOULDN'T BE A DANGER THERE, HE WOULDN'T HURT ANYONE THERE, WHILE IT'S PROBABLY NOT GOING – WOULDN'T BE A PLEASANT PLACE FOR HIM TO LIVE AND HE PROBABLY NEVER WOULD LIKE IT VERY MUCH, HE COULD ADAPT. HE COULD MAKE THE ADJUSTMENT.

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[2051] BUT YOU KNOW WHAT, HE HAS THE BACKGROUND, THE UPBRINGING, NEVER BEEN IN TROUBLE BEFORE, HAD A MAMA AND A DADDY THAT SHOWS HE'S NOT ALL BAD. HE WAS RAISED RIGHT. DESPITE THE TERRIBLE THING HE'S DONE, HE'S GOT THE TOOLS TO LIVE THE RIGHT WAY IN AN INSTITUTION FROM NOW ON AND THESE ARE THINGS YOU NEED TO CONSIDER. THESE ARE THINGS THAT OUR LAW REQUIRES YOU TO CONSIDER. THE LAW NEVER EVER SAYS YOU HAVE

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[2055] BILLY KELLY REALLY ONLY HAS TWO CHOICES IN THIS WORLD. THAT'S DEATH OR DEATH. NOW, WHAT DO I MEAN BY THAT? EITHER HE CAN GO TO DEATH BY THE DEATH PENALTY AND HAVE THE PEACE OF MIND OF KNOWING THAT HIS FAITH IS SECURED, THAT THAT'S WHERE HE'S GOING AND DIES A SLOW PAINLESS DEATH. HE CAN DO THAT. OR HE CAN GO TO LIFE IN PRISON.

[2056] NOW, LET'S TALK ABOUT LIFE IN PRISON BECAUSE LIFE IN PRISON IS A TRUE PUNISHMENT AND I DON'T KNOW WHERE THIS HAS COME ABOUT OR SOME REASON PEOPLE HAVE THOUGHT LIFE IN PRISON, MAN, THAT'S A CAKEWALK. MAN, THAT AIN'T NO BIG DEAL. HE'S A SEVENTEEN-YEAR-OLD BOY. SHOOT, HE WILL HAVE A GREAT TIME. I DON'T UNDERSTAND WHERE THAT MENTALITY IS COMING FROM. I DON'T KNOW WHERE EVERYBODY IS GETTING THAT FROM. THIS IS A

HORRIBLE CASE. IT DESERVES A HORRIBLE, HORRIBLE SENTENCE. AND, LADIES AND GENTLEMEN, LIFE IN PRISON IS WORSE THAN DEATH BECAUSE IT'S A SLOW DEATH, A SLOW DEATH.

WELL, YOU CAN SAY, WELL, HE'S GOING TO SET UP HIS HOUSE AND HE'S GOING TO DO THIS. WE CAN ALL BE SNIDE ABOUT IT. WE CAN DO THAT SORT OF THING. BUT, LADIES AND GENTLEMEN, PRISON AIN'T PRETTY. AND THAT'S NOT COMING FROM US. THAT [sic] COMING FROM THE STATE'S OWN WITNESSES. Y'ALL WERE HERE LAST NIGHT. Y'ALL WERE HERE AND Y'ALL HEARD THE TESTIMONY OF THEIR WITNESSES, THE OFFICERS AND THE INMATES. YOU HAVE GOT TO WATCH YOUR BACK EVERYDAY, EVERY NIGHT. YOU DON'T KNOW IF YOU ARE GOING TO WAKE UP THE NEXT MORNING ALIVE.

IF YOU WANT BILLY KELLY TO PAY A PRICE FOR WHAT HE DID – I DO – MAKE HIM WONDER IF HE'S GOING TO LIVE OR DIE THAT NEXT MORNING, MAKE HIM WONDER IF HE'S GOING TO [2057] HAVE SOME MAN JUMPING ON HIS BACK THE NEXT MORNING, MAKE HIM WONDER WHO IS GOING TO BE HIS BOYFRIEND THE NEXT DAY. I'M NOT ASKING FOR MERCY. MR. MYERS SAID I WAS ASKING FOR MERCY.

I'M NOT ASKING FOR ANY MERCY. I'M NOT GOING TO INSULT YOU. I'M ASKING YOU TO PUNISH HIM, PUT HIM IN A SITUATION WHERE EVERY DAY IS GOING TO BE HELL AND IT WILL BE AND THEY CAN TAKE CARE OF HIM. YEAH, HE CAN ADAPT.

ADAPT IS SORT OF A FUNNY WORD. IT MAKES IT SOUND LIKE, OH, IF HE GOES IN THERE, OKAY, EVERYTHING WILL BE FINE AND DANDY. WHAT THAT MEANS IS BILLY KELLY CAN ADJUST TO LIFE AND THEY CAN HANDLE HIM. AND THEY CAN. THEY CAN HANDLE HIM.

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[2058] HIM TO PAY FOR WHAT HE DID THAT HORRIBLE NIGHT AND I WANT Y'ALL TO MAKE HIM PAY. DON'T SHOW MERCY, GIVE HIM LIFE IN PRISON.

[2060] **CHARGE TO THE JURY**

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(WHEREUPON, THE COURT CHARGED THE JURY AS FOLLOWS:)

THE COURT: MR. FOREMAN AND MEMBERS OF THE JURY, YOU HAVE HEARD THE TESTIMONY AND EVIDENCE AND ARGUMENTS OF THE STATE AND THE DEFENDANT. I WILL NOW EXPLAIN TO YOU THE LAW THAT APPLIES TO THIS CASE.

UNDER THE CONSTITUTION AND LAWS OF SOUTH CAROLINA, YOU ARE THE FINDERS OF THE FACTS IN THIS CASE. I DO NOT HAVE THE RIGHT TO PASS UPON THE FACTS OR EVEN TO EXPRESS ANY OPINION I MIGHT HAVE AS TO THEM.

ALSO, YOU ARE THE JUDGES, THE SOLE JUDGES, OF THE CREDIBILITY, THE BELIEVABILITY, OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. IN PASSING UPON THEIR CREDIBILITY, [2061] YOU MAY TAKE INTO CONSIDERATION MANY THINGS, SUCH AS THE FOLLOWING:

THE DEMEANOR OR MANNER OF TESTIFYING;

WHETHER THE WITNESS HAD REASON TO BE BIASED OR PREJUDICED;

WHETHER A WITNESS' TESTIMONY WAS CONTRADICTED, ON THE ONE HAND, OR SUPPORTED AND CORROBORATED ON THE OTHER HAND.

NOW, OF COURSE, YOU CERTAINLY DO NOT DETERMINE THIS CREDIBILITY OR BELIEVABLE [sic] BY COUNTING THE NUMBER OF WITNESSES FOR EITHER SIDE. YOU MAY BELIEVE A SMALL PORTION OF A WITNESS' TESTIMONY AND DISREGARD THE LARGER OR VICE VERSA. YOU MAY BELIEVE ONE WITNESS AGAINST MANY, OR MANY AGAINST ONE. ALL THESE THINGS YOU CONSIDER, BEARING IN MIND THAT YOU SHOULD GIVE THE DEFENDANT THE BENEFIT OF A REASONABLE DOUBT.

NOW, I CHARGE USE FURTHER, MR. FOREMAN AND MEMBERS OF THE JURY, THE FACT THAT A DEFENDANT ELECTS NOT TO TESTIFY IN HIS OWN BEHALF CANNOT AND MUST NOT BE CONSIDERED AGAINST HIM UNDER ANY CIRCUMSTANCES OR IN ANY MANNER WHATSOEVER. THE DECISION OF ANY DEFENDANT NOT TO TAKE THE WITNESS STAND AND TESTIFY IN HIS OWN BEHALF DOES

NOT CREATE ANY INFERENCE AGAINST HIM. AND I TELL YOU THAT YOU MUST NOT PERMIT THAT FACT TO WEIGH IN EVEN THE SLIGHTEST DEGREE AGAINST THE DEFENDANT. YOU SHOULD NOT [2062] PERMIT THIS FACT TO ENTER INTO THE DISCUSSIONS OR DELIBERATIONS OF THE ISSUES IN THIS CASE.

NOW, LADIES AND GENTLEMEN, THE RULES OF EVIDENCE ORDINARILY DO NOT PERMIT WITNESSES TO TESTIFY AS TO THEIR OPINION OR CONCLUSIONS. AN EXCEPTION, HOWEVER, TO THIS RULE DOES EXIST AS TO THOSE TO WHOM WE CALL "EXPERT WITNESSES".

EXPERT WITNESSES ARE THOSE WHOM, BY EDUCATION AND EXPERIENCE, HAVE BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION OR CALLING. THESE WITNESSES MAY STATE THEIR OPINIONS AS TO RELEVANT AND MATERIAL MATTERS, IN WHICH THEY PROFESS TO BE EXPERTS, AND MAY ALSO STATE THE REASONS FOR THEIR OPINION.

YOU SHOULD CONSIDER EXPERT OPINION RECEIVED IN EVIDENCE IN THIS CASE, AND GIVE IT SUCH WEIGHT AS YOU MAY THINK IT DESERVES. IF YOU SHOULD DECIDE THAT THE OPINION OF AN EXPERT WITNESS IS NOT BASED UPON SUFFICIENT EDUCATION AND EXPERIENCE, OR IF YOU SHOULD CONCLUDE THAT THE REASONS GIVEN IN SUPPORT OF THOSE OPINIONS ARE NOT SOUND OR IF YOU FEEL THAT IT IS OUTWEIGHED BY THE OTHER EVIDENCE, YOU MAY DISREGARD THAT OPINION ENTIRELY.

NOW, BY THE SAME CONSTITUTION AND LAW WHICH MAKES YOU THE FINDERS OF THE FACTS AND THE EVIDENCE AS I HAVE DISCUSSED WITH YOU, I AM, AS THE JUDGE, MADE THE SOLE AND ONLY INSTRUCTOR IN THE LAW. YOU MUST ACCEPT AS CORRECT THE [2063] LAW WHICH I CHARGE AND APPLY IT TO THE EVIDENCE AS YOU FIND IT, AND REACH YOUR VERDICT.

AND FINALLY, I CHARGE YOU IN THIS REGARD: THAT YOU OR FOR THAT MATTER, I, SHOULD NOT BE CONCERNED ABOUT WHAT WE THINK THE LAW OUGHT TO BE, BUT RATHER WHAT I CHARGE YOU THE LAW TO BE.

LADIES AND GENTLEMEN, THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING A TRIAL: DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS A EYEWITNESS.

CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE CONSIDERATION OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE, NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN THAT OF DIRECT EVIDENCE. YOU SHOULD CONSIDER ALL THE EVIDENCE IN THIS CASE.

NOW, LADIES AND GENTLEMEN OF THE JURY, I FURTHER CHARGE YOU THAT EVIDENCE OF PRIOR CRIMES OR MISCONDUCT BY THE DEFENDANT SHOULD NOT BE CONSIDERED AND MAY NOT BE USED AS PROOF OF ANY STATUTORY AGGRAVATING CIRCUMSTANCES ABOUT WHICH I WILL INSTRUCT YOU SHORTLY. HOWEVER, YOU MAY [2064] CONSIDER SUCH EVIDENCE ONLY AS TO THE DEFENDANT'S CHARACTER, HIS CHARACTERISTICS, BUT NOT AS PROOF OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCES.

NOW, AGGRAVATING CRIMES ARE COMMITTED WHILE IN THE COMMISSION – WHILE IN COMMISSION OF A MURDER WHEN THEY ARE CONSUMMATED IN A CONTINUOUS SERIES OF ACTS WITH THE MURDER AND ARE IN THE SAME PLACE AND ARE NOT SEPARATED BY ANY SUBSTANTIAL LAPSE OF TIME. THE FACT THAT THE CRIMES ARE COMMITTED AFTER THE MURDER DOES NOT INVALIDATE THEM AS STATUTORY AGGRAVATING CIRCUMSTANCES.

NOW, LADIES AND GENTLEMEN OF THE JURY, BEFORE I CHARGE YOU AND EXPLAIN TO YOU THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT ARE ALLEGED, I'M GOING TO GIVE YOU THE LAW OR CHARGE YOU OR INSTRUCT YOU AS TO THE LAW IN RESPECT TO THE VARIOUS AGGRAVATING CIRCUMSTANCES.

KIDNAPPING. THE DEFENDANT IN THIS CASE IS CHARGED – IS ALLEGED – THE DEFENDANT IN THIS

CASE HAS A AGGRAVATING CIRCUMSTANCE ALLEGED AGAINST HIM AS TO KIDNAPPING.

KIDNAPPING IS THE INTENTIONAL TAKING OF A PERSON AND COMPELLING HER TO BE DETAINED AGAINST HER WILL. IT IS THE WILLFUL AND UNLAWFUL SEIZING OF A PERSON AGAINST HER WILL WITH AN INTENT TO CAUSE HER TO BE CONFINED, IMPRISONED OR DETAINED. THE ESSENCE OF THE OFFENSE OF KIDNAPPING IS THE UNLAWFUL SECRET HOLDING OR IMPRISONMENT OF A PERSON. [2065] KIDNAPPING MEANS THE CARRYING AWAY OF A PERSON BY UNLAWFUL FORCE OR BY FRAUD OR AGAINST HER WILL OR SEIZING AND DETAINING HER FOR THE PURPOSE OF SO CARRYING HER AWAY. THE GRAVAMEN OF THE OFFENSE OF KIDNAPPING IS SOME FORM OF COMPULSION, BUT THE LAW SAYS THAT THE REQUISITE FORCE OR COMPULSION NEED NOT CONSISTS [sic] OF THE USE OF ACTUAL PHYSICAL FORCE OR VIOLENCE OR OF EXPRESSED THREATS. AN ESSENTIAL ELEMENT OF THE OFFENSE OF KIDNAPPING IS THAT THE TAKING OR DETENTION OF THE PERSON KIDNAPPED IS WITHOUT LAWFUL AUTHORITY.

NOW, ANOTHER AGGRAVATING CIRCUMSTANCE IS IN THE FORM OF BURGLARY.

NOW, BURGLARY, AS IT RELATES TO THIS CASE: THE STATE MUST PROVE FOUR ELEMENTS.

FIRST, THAT A PERSON MUST ENTER A BUILDING. SECONDLY, THAT THAT ENTERING MUST BE WITHOUT CONSENT. THIRDLY, WITH AN INTENT TO COMMIT A CRIME THEREIN. FOURTHLY, THAT THE

ENTERING OR REMAINING IN THE BUILDING OCCURS IN THE NIGHTTIME AND WHEN EFFECTING ENTRY OR WHILE IN THE BUILDING OR WHEN IN THE IMMEDIATE FLIGHT THEREFROM, THAT THE DEFENDANT OR ANY PARTICIPANT IN THE CRIME DID ANY ONE OF THE FOLLOWING: WAS ARMED WITH A DEADLY WEAPON OR CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT OF THE CRIME OR USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT OR DISPLAYS WHAT IS OR APPEARS [sic] BE A [2066] KNIFE.

NOW, ANOTHER AGGRAVATING CIRCUMSTANCE IS ARMED ROBBERY, AS WELL AS LARCENY, AND THOSE TWO CRIMES ARE CONTAINED WITHIN MY CHARGE ON ARMED ROBBERY.

WHAT IS ARMED ROBBERY? THE CRIME OF ARMED ROBBERY INCLUDES ALL THE ELEMENTS OF LARCENY AND ROBBERY.

WHAT THEN IS LARCENY? I CHARGE YOU THAT THERE ARE FOUR ELEMENTS WHICH MUST BE PRESENT AND ESTABLISHED BEYOND A REASONABLE DOUBT TO MAKE OUT THE CRIME OF LARCENY. THESE FOUR ELEMENTS ARE: THAT THERE WAS A TAKING; THAT THE TAKING WAS OF PERSONAL PROPERTY; THAT AFTER BEING TAKEN, THE PROPERTY WAS CARRIED AWAY; THAT THE TAKING AND CARRYING AWAY OF THE PROPERTY WAS DONE WITH THE INTENT TO STEAL.

AND I CHARGE YOU THAT UNITED STATES CURRENCY IS PERSONAL PROPERTY.

ROBBERY INCLUDES EACH OF THE FOUR ELEMENTS I HAVE JUST EXPLAINED.

IN ADDITION TO THESE FOUR ELEMENTS, TWO OTHER ELEMENTS ARE NECESSARY TO MAKE OUT THE CRIME OF ROBBERY. THOSE ELEMENTS ARE: THAT THE PROPERTY MUST BE TAKEN FROM THE PERSON OF ANOTHER OR IN HIS PRESENCE AND THAT THE TAKING AND CARRYING AWAY OF THE PROPERTY MUST BE – MUST HAVE BEEN ACCOMPLISHED BY PLACING THE OTHER PERSON IN FEAR BY VIOLENCE OR THREATS OF VIOLENCE SO AS TO MAKE THAT PERSON SURRENDER THE PROPERTY WITHOUT THEIR CONSENT AND [2067] AGAINST THEIR WILL.

THEREFORE, THE CRIME OF ARMED ROBBERY INCLUDES ALL OF THE ELEMENTS OF LARCENY AND ROBBERY. AND IN ORDER TO MAKE OUT THE CRIME OF ARMED ROBBERY, HOWEVER, AN ADDITIONAL ELEMENT MUST BE PROVED. THE ROBBERY MUST HAVE BEEN COMMITTED WHILE ARMED WITH A DEADLY WEAPON. THE PERSON COMMITTING THE ROBBERY MUST HAVE HAD AND USED A DEADLY WEAPON WITH WHICH HE ATTAINED POSSESSION OF THE PROPERTY OR PLACED THE ONE POSSESSING THE PROPERTY IN FEAR IN ORDER TO OBTAIN THE PROPERTY.

SECTION 16-11-330(A) OF THE CODE OF LAWS OF THE STATE OF SOUTH CAROLINA, 1976, AS AMENDED PROVIDES: A PERSON COMMITTED FOR THE CRIME OF ROBBERY WHILE ARMED WITH A PISTOL, DIRK, SLINGSHOT, METAL KNUCKLES,

RAZOR OR OTHER DEADLY WEAPON COMMITS ARMED ROBBERY.

AND I CHARGE YOU THAT A KNIFE IS A WEAPON IN ACCORDANCE WITH THIS STATUTE.

NOW ANOTHER AGGRAVATING CIRCUMSTANCE IS THAT OF PHYSICAL TORTURE.

LADIES AND GENTLEMEN OF THE JURY, TORTURE OCCURS WHEN THE VICTIM IS SUBJECTED TO SERIOUS PHYSICAL ABUSE BEFORE DEATH. TORTURE OCCURS WHEN THE VICTIM IS SUBJECTED TO AGGRAVATED BATTERY.

WHAT IS AGGRAVATED BATTERY? AN AGGRAVATED BATTERY IS AN UNLAWFUL ACT OF VIOLENT INJURY TO THE PERSON [2068] OF ANOTHER ACCOMPANIED BY CIRCUMSTANCES OF AGGRAVATION. SUCH AS THE USE OF A DANGEROUS OR DEADLY OBJECT, THE INFLICTION OF SERIOUS BODILY INJURY WITH INTENT TO COMMIT A FELONY, A GREAT DISPARITY BETWEEN THE AGES AND PHYSICAL CONDITION OF THE PARTIES, A DIFFERENCE IN THE SEXES.

PHYSICAL TORTURE IS THE INTENTIONAL INFLICTION OF SERIOUS, VILE, HORRIBLE OR INHUMAN ABUSE UPON THE BODY OF ANOTHER BEFORE DEATH. THE INSTANTANEOUS DEATH OF THE VICTIM DOES NOT CONSTITUTE TORTURE. PHYSICAL TORTURE MAY INCLUDE THE MALICIOUS INFLICTION OF BODILY HARM TO ANOTHER BY DEPRIVING HER OF A MEMBER OF HER BODY OR BY RENDERING A MEMBER OF HER BODY USELESS OR BY SERIOUSLY

DISFIGURING HER BODY OR A MEMBER OF HER BODY OR THE INTENTIONAL AND UNMERCIFUL PROLONGING OF SEVERE PAIN AND ABUSE UPON THE BODY OR THE INTENTIONAL AND UNMERCIFUL INFLICTION OF SERIOUS AND EXTENSIVE PHYSICAL PAIN AND ABUSE TO THE BODY OF ANOTHER.

MR. FOREMAN AND MEMBERS OF THE JURY, IT NOW BECOMES YOUR DUTY TO DECIDE WHAT SENTENCE YOU WILL RECOMMEND THAT THIS COURT IMPOSE UPON THE DEFENDANT, WILLIAM ARTHUR KELLY.

THERE ARE TWO VERDICTS THAT YOU ARE TO CONSIDER IN THIS CASE.

ONE IS THE DEATH PENALTY, WHICH IN THIS STATE, IS BY ELECTROCUTION OR LETHAL INJECTION, AND THE OTHER IS LIFE [2069] IMPRISONMENT.

AND I CHARGE YOU THAT THE TERMS "LIFE IMPRISONMENT" AND "DEATH SENTENCE" ARE TO BE UNDERSTOOD IN THIS ORDINARY AND PLAIN MEANING.

PLEASE UNDERSTAND, LADIES AND GENTLEMEN OF THE JURY, THAT YOUR SENTENCING RECOMMENDATION WILL BE FOLLOWED BY THIS COURT.

NOW, THE ORDER IN WHICH I EXPLAIN THESE TWO SENTENCES IS IN NO WAY A RECOMMENDATION BY THIS COURT AS TO WHICH SENTENCE YOU SHOULD CONSIDER TO RECOMMEND. IT IS SIMPLY THAT ONE MUST BE STATED FIRST.

NOW, I HOLD IN MY HAND, A RECOMMENDATION OF DEATH PENALTY FORM.

BY THIS RECOMMENDATION OF SENTENCE FORM, WHICH I HOLD IN MY HAND, YOU, THE JURY, MAY RECOMMEND THAT THIS COURT SENTENCE THE DEFENDANT TO DEATH. PLEASE OBSERVE THAT IMMEDIATELY BELOW THE BODY OF THE RECOMMENDATION, THERE ARE TWELVE LINES. THIS IS WHERE, SHOULD YOU DECIDE TO RECOMMEND THE DEATH PENALTY, EACH ONE OF YOU WOULD SIGN YOUR NAME. IT IS THE LAW IN THIS STATE, MR. FOREMAN AND MEMBERS OF THE JURY, THAT A RECOMMENDATION FOR IMPOSITION OF THE DEATH PENALTY BE A UNANIMOUS RECOMMENDATION AND THAT EACH AND EVERY JUROR SIGN HIS OR HER NAME ON THE RECOMMENDATION FORM.

I WILL NOW READ TO YOU THE TEXT OF THIS FORM AND [2070] I QUOTE: "WE, THE JURY IN THE ABOVE-ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, TO WIT: AND AT THIS POINT, THERE IS A PLACE PROVIDED FOR YOU TO WRITE SUCH CIRCUMSTANCES ABOUT WHICH I WILL INSTRUCT YOU FURTHER. "NOW RECOMMEND TO THE COURT, THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED TO DEATH."

NOW, FOR THIS RECOMMENDATION TO BE MADE, THAT IS, THAT THE DEFENDANT BE SENTENCED TO DEATH, YOU MUST FIRST FIND THAT A

STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED BEYOND A REASONABLE DOUBT.

WHAT IS A STATUTORY AGGRAVATING CIRCUMSTANCE? IT IS A FACT, AN INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE SOUTH CAROLINA GENERAL ASSEMBLY HAS DECLARED BY STATUTE WOULD MAKE WORSE, THAT IS, TO AGGRAVATE THE OFFENSE OF MURDER WHEN THE TWO OCCUR TOGETHER.

IN OTHER WORDS, IT IS SOMETHING WHICH INCREASES THE ENORMITY, OR ADDS TO THE INJURIOUS CONSEQUENCES OF THE OFFENSE.

NOW, LADIES AND GENTLEMEN, UPON THIS SHEET OF PAPER WHICH I HOLD IN MY HAND ARE WRITTEN THE WORDS, "STATUTORY INSTRUCTIONS". YOU WILL HAVE THIS PAPER IN YOUR JURY ROOM DURING YOUR DELIBERATIONS.

THE BODY OF THIS FORM STATES AND I QUOTE: "IN [2071] DETERMINING WHETHER TO RECOMMEND THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED BY THE COURT TO LIFE IMPRISONMENT OR TO DEATH, YOU MAY CONSIDER THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES: AND I HAVE CHARGED YOU OR EXPLAINED TO YOU OR INSTRUCTED YOU THE LAW THAT APPLIES TO THESE VARIOUS STATUTORY AGGRAVATING CIRCUMSTANCES AND THEY ARE AS FOLLOWS:

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF KIDNAPPING.

THE MURDER WAS COMMITTED WHITE [sic] IN THE COMMISSION OF BURGLARY.

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON.

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF LARCENY WITH THE USE OF A DEADLY WEAPON.

AND THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF PHYSICAL TORTURE."

LET ME EMPHASIZE TO YOU THAT THESE ARE THE ONLY CIRCUMSTANCES YOU MAY CONSIDER AS AGGRAVATING CIRCUMSTANCES. SHOULD YOU FIND – AND IT MUST BE A UNANIMOUS FINDING, THAT IS, A FINDING BY EACH AND EVERY ONE OF YOU – SHOULD YOU FIND THAT THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT THE EXISTENCE OF ONE OR MORE OF THE CIRCUMSTANCES LISTED ON THIS SHEET OF PAPER, THEN YOU WOULD BE AUTHORIZED, WHICH IS TO SAY PERMITTED, TO CONSIDER [2072] RECOMMENDING TO THIS COURT THAT THE DEFENDANT BE SENTENCED TO DEATH.

NOW, WHAT DO I MEAN BY THE TERM, PROVEN BEYOND A REASONABLE DOUBT? NOW, A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

AND THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE

DOUBT. SOME OF YOU MAY HAVE SERVED AS JURORS IN CIVIL CASES WHERE YOU WERE TOLD THAT IT IS ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY TRUE THAN NOT TRUE.

IN CRIMINAL CASES, THE STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE BEYOND A REASONABLE DOUBT. PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT. THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES, THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. AND, PLEASE, PAY PARTICULAR ATTENTION TO THIS. YOU ARE NEVER REQUIRED TO RECOMMEND THE DEATH PENALTY, EVEN IF YOU FIND THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE OFFENSE OCCURRED.

HOWEVER, IF YOU FIND THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THEN PLEASE LIST THAT CIRCUMSTANCE ON THE FORM ENTITLED "AGGRAVATING [2073] CIRCUMSTANCES" AND ALL TWELVE JURORS WILL SIGN THIS FORM.

AND I HOLD IN MY HAND THE AGGRAVATING CIRCUMSTANCES FORM WHICH SAYS, WE, THE JURY IN THE ABOVE-ENTITLED CASE, FIND BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES.

AND YOU WOULD LIST THE CIRCUMSTANCES THAT YOU FIND BEYOND A REASONABLE DOUBT,

UNANIMOUSLY, IF THERE ARE THOSE, MR. FOREMAN AND LADIES AND GENTLEMEN.

NOW, I INSTRUCT YOU FURTHER THAT SHOULD YOU FIND THAT THE STATE HAS NOT PROVEN THAT SUCH A CIRCUMSTANCE OR CIRCUMSTANCES EXISTED; THAT IS, TO SAY YOU FIND THAT YOU STILL HAVE A REASONABLE DOUBT AS TO THE EXISTENCE OF SUCH A CIRCUMSTANCE, THEN YOU WOULD NOT BE AUTHORIZED TO RECOMMEND THE DEATH PENALTY AND YOUR RECOMMENDATION MUST BE LIFE IN PRISON.

NOW, SHOULD YOU FIND BEYOND A REASONABLE DOUBT THAT ONE OF THE AGGRAVATING CIRCUMSTANCES LISTED ON THE SHEET OF "STATUTORY INSTRUCTIONS" EXISTED AT THE TIME OF THE MURDER, AND SHOULD YOU DECIDE, AFTER CONSIDERING THE ELEMENTS IN FAVOR OF A RECOMMENDATION OF LIFE IMPRISONMENT, ABOUT WHICH I WILL INSTRUCT YOU SHORTLY, THAT THE RECOMMENDATION OF THE JURY IS TO BE THAT THE DEFENDANT BE SENTENCED TO DEATH, THEN IT WOULD BE YOUR DUTY, MR. FOREMAN, TO WRITE ON THE RECOMMENDATION OF SENTENCE FORM [2074] AND I HOLD IN MY HAND THE "RECOMMENDATION OF DEATH PENALTY" FORM THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH YOU HAVE FOUND.

THEN, MR. FOREMAN, YOU AND EACH AND EVERY JUROR WOULD SIGN YOUR NAMES IN THE SPACES PROVIDED.

DO YOU UNDERSTAND?

THE FOREMAN: YES.

THE COURT: NOW, BY THIS FORM WHICH I HOLD IN MY HAND, YOU, THE JURY, CAN RECOMMEND TO THIS COURT THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT.

I WILL NOW READ TO YOU THE TEXT OF THIS RECOMMENDATION FORM:

"WE, THE JURY, IN THE ABOVE-ENTITLED CASE, RECOMMEND TO THE COURT THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED TO LIFE IMPRISONMENT."

PLEASE NOTE THAT ALTHOUGH YOU MUST UNANIMOUSLY AGREE TO RECOMMEND LIFE IMPRISONMENT, ONLY THE FOREMAN IS REQUIRED TO SIGN THIS FORM.

I WILL NOW INSTRUCT YOU ON WHAT YOU MAY CONSIDER IN MAKING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND.

AS I PREVIOUSLY INSTRUCTED, IF YOU FIND THE EXISTENCE BEYOND A REASONABLE DOUBT OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THEN YOU ARE NOT PERMITTED, BUT NOT REQUIRED, TO RECOMMEND THE DEATH PENALTY. THERE ARE THREE CONDITIONS WHICH YOU SHOULD CONSIDER IN REACHING YOUR [2075] DECISION:

FIRST, WHETHER THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE WAS SUPPORTED BY THE EVIDENCE.

SECONDLY, WHETHER THE EXISTENCE OF ANY OTHER NON-STATUTORY MITIGATING CIRCUMSTANCES WAS SUPPORTED BY THE EVIDENCE.

THIRD, WHETHER FOR ANY REASON YOU CAN THINK OF OR FOR NO REASON AT ALL, THE DEFENDANT SHOULD BE A [sic] SENTENCED TO LIFE IMPRISONMENT.

NOW, WHAT IS A "STATUTORY MITIGATING CIRCUMSTANCE"?

IT IS A FACT, AN INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE SOUTH CAROLINA GENERAL ASSEMBLY HAS DECLARED BY STATUTE WOULD REDUCE THE SEVERITY OF THE OFFENSE OF MURDER.

IN OTHER WORDS, IT IS A CIRCUMSTANCE RECOGNIZED BY STATUTE AS ONE WHICH, IN FAIRNESS AND MERCY, MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER.

A MITIGATING CIRCUMSTANCE IS NEITHER JUSTIFICATION NOR EXCUSE FOR THE MURDER. IT SIMPLY LESSENS THE DEGREE OF ONE'S GUILT; THAT IS, MAKES HIM LESS BLAMEWORTHY OR LESS CULPABLE.

WHAT STATUTORY MITIGATING CIRCUMSTANCES SHOULD YOU CONSIDER?

[2076] AND I REFER, ONCE AGAIN, TO THIS SHEET OF PAPER ENTITLED, "STATUTORY INSTRUCTIONS".

AND IMMEDIATELY BELOW THE FIVE STATUTORY AGGRAVATING CIRCUMSTANCES THAT I HAVE PREVIOUSLY READ TO YOU, THE TEXT CONTINUES AND I QUOTE: "YOU MAY ALSO CONSIDER THE FOLLOWING STATUTORY MITIGATING CIRCUMSTANCES: THE DEFENDANT HAD – EXCUSE ME. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON.

THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

THE DEFENDANT WAS BELOW THE AGE OF EIGHTEEN AT THE TIME OF THE CRIME.

THOSE ARE THE THREE STATUTORY MITIGATING CIRCUMSTANCES THAT ARE LISTED ON THIS FORM.

AND, MR. FOREMAN AND LADIES AND GENTLEMEN, YOU MAY ALSO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES."

NOW, WHILE THERE MUST BE SOME EVIDENCE WHICH SUPPORTS A FINDING BY YOU THAT A STATUTORY OR A NON-STATUTORY CIRCUMSTANCE EXISTS, AND IT IS NOT NECESSARY FOR YOU TO FIND THE EXISTENCE OF SUCH A CIRCUMSTANCE UNANIMOUSLY NOR BEYOND A REASONABLE DOUBT.

IN REACHING YOUR DECISION AS TO WHICH SENTENCE YOU RECOMMEND, YOU WILL CONSIDER

THE AGGRAVATING AND [2077] MITIGATING CIRCUMSTANCES.

WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU CAN EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH A FINDING IS MADE BEYOND A REASONABLE DOUBT, YOU MAY RECOMMEND THE DEATH SENTENCE EVEN THOUGH YOU FIND THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE OR A NON-STATUTORY MITIGATING CIRCUMSTANCE OR BOTH.

IN OTHER WORDS, THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCES, [sic] AN ALLEGED NON-STATUTORY MITIGATING CIRCUMSTANCE OR BOTH IS NOT A BAR TO THE IMPOSITION OF THE DEATH PENALTY.

THE THIRD ELEMENT YOU MAY CONSIDER IF YOU SHOULD CONCLUDE THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS IS WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT FOR ANY REASON, OR FOR NO REASON AT ALL. THIS IS WHAT HAS BEEN TRADITIONALLY REFERRED TO AS A "RECOMMENDATION OF MERCY", AND SHOULD YOUR DECISION BE SUCH, YOU WOULD SO INDICATE BY RETURNING TO THE COURT THE FORM THE "RECOMMENDATION OF LIFE IMPRISONMENT", WHICH WILL BE SIGNED BY THE FOREMAN ALONE.

IN OTHER WORDS, YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT IF YOU FIND A STATUTORY OR NON-STATUTORY MITIGATING

CIRCUMSTANCE OR YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT AS AN ACT OF MERCY.

IN ANY INSTANCE, SHOULD YOU CHOOSE TO RECOMMEND [2078] LIFE IMPRISONMENT, YOUR DECISION MUST BE A UNANIMOUS ONE, AND ONE THAT THE FOREMAN ALONE WOULD BE REQUIRED TO SIGN ON THE RECOMMENDATION FORM.

LET ME SUMMARIZE TO YOU WHAT I HAVE JUST TOLD YOU.

YOU HAVE IN THE JURY ROOM DURING YOUR DELIBERATIONS FOUR FORMS.

RECOMMENDATION OF LIFE IMPRISONMENT FORM;

RECOMMENDATION OF DEATH PENALTY FORM;

STATUTORY INSTRUCTIONS;

AGGRAVATING CIRCUMSTANCES.

THE STATUTORY INSTRUCTIONS STATE THE ONLY AGGRAVATING CIRCUMSTANCES YOU SHALL CONSIDER IN THIS CASE. SHOULD YOU FAIL TO FIND BEYOND A REASONABLE DOUBT THAT AT LEAST ONE OF THESE CIRCUMSTANCE [sic] EXISTED AT THE TIME THE MURDER WAS COMMITTED, THEN YOU WOULD GO NO FURTHER. YOUR RECOMMENDATION MUST BE FOR LIFE IMPRISONMENT.

SHOULD YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, YOU WOULD

THEN BE AUTHORIZED TO CONSIDER RECOMMENDING THE DEATH PENALTY. IN YOUR DELIBERATIONS, YOU WILL CONSIDER ANY STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH ARE SUPPORTED BY THE EVIDENCE. YOU WILL CONSIDER THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES YOU FOUND AND THE MITIGATING CIRCUMSTANCES AND YOU WILL THEN DECIDE WHETHER [2079] YOU WILL RECOMMEND THE DEATH OR LIFE IMPRISONMENT.

YOU MAY ALSO CONSIDER ANY OTHER FACTOR IN MITIGATION OF THE OFFENSE, AND YOU CAN RECOMMEND A SENTENCE OF LIFE IMPRISONMENT FOR NO REASON AT ALL.

IF YOU DECIDE TO RECOMMEND THE DEATH PENALTY, YOU WILL COMPLETE THE PROPER FORM. YOU MUST WRITE OUT THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES THAT YOU FOUND, AND ALL TWELVE JURORS MUST SIGN THE RECOMMENDATION.

SHOULD YOU DECIDE TO RECOMMEND LIFE IMPRISONMENT, ONLY THE FOREMAN MUST SIGN THE RECOMMENDATION AND NO REASON IS TO [sic] GIVEN FOR YOUR DECISION.

WHATEVER YOUR RECOMMENDATION IS, IT MUST BE A UNANIMOUS ONE; THAT IS, TO SAY, IT MUST BE THE VERDICT OF EACH AND EVERY JUROR.

AND PLEASE REMEMBER THAT YOUR SENTENCING RECOMMENDATION WILL BE FOLLOWED BY THIS COURT.

IN CONSIDERING WHETHER TO RECOMMEND THE DEFENDANT IS TO BE SENTENCED TO DEATH OR LIFE IMPRISONMENT, I CHARGE YOU THAT AS JURORS YOU MUST DECIDE THE ISSUE INVOLVED IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT PREJUDICE TO ANY PARTY.

YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE FACTS OF THIS CASE, AND WHEN YOU COMPLY WITH YOUR OATH TO DO SO, THEN NO ONE WILL HAVE A RIGHT TO CRITICIZE YOUR VERDICT AND [2080] YOU WILL HAVE FULLY DISCHARGED YOUR DUTY AS JURORS.

YOU ARE TO DECIDE THIS CASE FROM THE TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE SWORN WITNESSES, ALONG WITH THE OTHER EVIDENCE THAT HAS BEEN INTRODUCED.

I FURTHER CHARGE YOU THAT AS JURORS, YOU MUST DECIDE THE ISSUES IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT PREJUDICE TO ANY PARTY.

YOU CANNOT ALLOW YOURSELF TO BE GOVERNED BY SYMPATHY, BY PREJUDICE, BY PASSION, BY PUBLIC OPINION OR ANY OTHER ARBITRARY FACTOR. BOTH THE STATE AND THE DEFENDANT HAVE THE RIGHT TO EXPECT THAT EACH OF YOU WILL CAREFULLY AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THE CASE AND THAT YOU WILL FOLLOW THE LAW AS I HAVE EXPLAINED IT TO YOU.

NOW, LADIES AND GENTLEMEN, BEFORE I SEND YOU TO THE JURY ROOM, MR. FOREMAN, LET ME SUGGEST THAT AS YOU GO TO THE JURY ROOM – AND YOU WILL BE INSTRUCTED IN A MOMENT ABOUT YOUR DELIBERATIONS – THAT WHEN YOU BEGIN THAT PROCESS, THAT YOU READ OVER THE "STATUTORY INSTRUCTIONS" AND THEN THAT YOU CONSIDER WHETHER OR NOT THERE IS THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES. IF AN AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES ARE FOUND, THEN THEY MUST BE LISTED ON THIS FORM AND EACH AND EVERY JUROR MUST AFFIX THEIR NAME TO THE FORM AND PLEASE DATE IT TODAY WHICH IS SEPTEMBER 19TH.

[2081] AND, THEREAFTER, IF A STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES IS FOUND, THEN YOU MAY CONSIDER THE RECOMMENDATION OF A SENTENCE OF THE DEATH PENALTY. AND, ONCE AGAIN, IF THE JURY UNANIMOUSLY DETERMINES THAT BEYOND A REASONABLE DOUBT, THEN YOU WOULD LIST THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES THAT YOU HAVE FOUND AND EACH AND EVERY JUROR WOULD SIGN THEIR NAME TO THAT FORM AND DATE IT TODAY.

NOW, EVEN WITH THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, YOU MAY STILL RETURN A LIFE SENTENCE FOR ANY REASON OR FOR NO REASON AT ALL. AND IF YOU DO THAT UNANIMOUSLY, MR. FOREMAN, THEN YOU WOULD SIMPLY SIGN YOUR NAME AND DATE THIS FORM TODAY.

NOW, MR. FOREMAN AND LADIES AND GENTLEMEN, I'M GOING TO BE SENDING YOU TO THE JURY ROOM IN JUST A MOMENT. AND WOULD THE BAILIFFS PLEASE STAND THE ALTERNATE JURORS ASIDE AS THEY ARE DISMISSED.

DO NOT BEGIN YOUR DELIBERATIONS UNTIL I SEND WORD FOR YOU TO DO SO. I'M GOING TO TALK WITH THE LAWYERS AT THIS POINT AND IT MAY BE NECESSARY THAT I CALL YOU BACK INTO THE COURTROOM. HOWEVER, IF I DO THAT, THEN IT WOULD BE VERY QUICKLY.

ONCE AGAIN, PLEASE FILL OUT THE FORMS AS I HAVE INSTRUCTED YOU. ALSO, KEEP IN MIND THAT YOUR VERDICT MUST BE UNANIMOUS AS TO BOTH RECOMMENDATIONS. ALSO, KEEP IN MIND [2082] THAT YOUR DECISION AND YOUR VERDICT AS TO AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES MUST BE UNANIMOUS AND MUST BE BEYOND A REASONABLE DOUBT. THAT YOUR CONSIDERATION OF MITIGATING CIRCUMSTANCES DO NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT, AS WELL AS ANY NON-STATUTORY MITIGATING CIRCUMSTANCES.

ONCE AGAIN, LADIES AND GENTLEMEN, KEEP IN MIND THAT YOUR VERDICT MUST BE UNANIMOUS. THE WORD VERDICT COMES FROM THE LATIN WORD, "VEREDICTO" WHICH MEANS TO SPEAK THE TRUTH. AND ONCE YOU HAVE REACHED A VERDICT TO WHICH YOU ALL TWELVE AGREE, THEN IT WILL SPEAK THE TRUTH OF YOU

COLLECTIVELY AS A JURY, AS WELL AS INDIVIDUALLY.

PLEASE RETIRE TO THE JURY ROOM. DO NOT BEGIN YOUR DELIBERATIONS UNTIL I INSTRUCT YOU TO DO SO. AND PLEASE STAND THE ALTERNATES ASIDE, GENTLEMEN.

THE BAILIFF: YES, SIR.

(JURY OUT.)

THE COURT: ANY EXCEPTIONS OR ADDITIONS FROM THE STATE?

THE SOLICITOR: NONE FROM THE STATE.

THE COURT: FROM THE DEFENSE?

MS. FULLWOOD: SIMPLY, MY EXCEPTION TO THE COURT'S FAILURE TO CHARGE MY REQUEST TO CHARGE NUMBER ONE AND IN THE ALTERNATIVE, MY REQUEST TO CHARGE TWO.

THE COURT: YES, MA'AM. SO NOTED FOR THE RECORD.

* * *

[2084] THE COURT: ALL RIGHT.

LET ME MAKE A FEW OTHER ANNOUNCEMENTS. FIRST OF ALL, TO THE LAWYERS INVOLVED IN THE CASE, CERTAINLY, I'VE ENJOYED TRYING THIS CASE WITH YOU. IT'S PRESENTED A LOT OF INTERESTING ISSUES.

* * *

(WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 6:37 P.M.)

(RECESS.)

THE BAILIFF: COURT IS NOW IN SESSION.

[2085] **VERDICT**

* * *

THE COURT: THANK YOU.

YOU MAY BE SEATED.

LET ME ONCE AGAIN REMIND EVERYONE TO – IF YOU DO NOT FEEL THAT YOU CANNOT CONTROL YOUR EMOTIONS REGARDLESS OF THE VERDICT, PLEASE STEP OUTSIDE BECAUSE I WILL NOT TOLERATE ANY OUTBURST.

ALL RIGHT. BRING THE JURY BACK.

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT 7:20 P.M.)

THE COURT: MR. FOREMAN, IT'S MY UNDERSTANDING THAT YOU HAVE REACHED A VERDICT TO WHICH YOU ALL TWELVE AGREE, IS THAT CORRECT?

THE FOREMAN: THAT'S CORRECT.

THE COURT: AND YOU HAVE FILLED OUT THE FORM AS I INSTRUCTED YOU?

THE FOREMAN: YES, SIR.

THE COURT: ALL RIGHT.

PLEASE HAND THEM TO THE BAILIFF.

(WHEREUPON, THE VERDICT FORMS ARE HANDED TO THE CLERK AT THIS TIME.)

THE COURT: ALL RIGHT, MR. CLERK. YOU MAY PUBLISH THE VERDICT.

COUNTY OF LEXINGTON, *STATE OF SOUTH CAROLINA VERSUS WILLIAM ARTHUR KELLY.*

WE, THE JURY, OF THE ABOVE-ENTITLED CASE, FIND [2086] BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES

(1) KIDNAPPING;

(2) BURGLARY;

(3) ROBBERY WITH AN ARMED – WITH ARMED AND DEADLY WEAPON;

(4) LARCENY WITH THE USE OF A DEADLY WEAPON;

(5) COMMISSION OF PHYSICAL –

THE COURT: PHYSICAL TORTURE.

THE CLERK: PHYSICAL TORTURE.

FOREPERSON: COLIN BENNETT, EARL HARRISON, MATTHEW GARRISON, CHRISTINE REYNOLDS; TAMMY SMITH, TAMMY WOODS, MARVIN BRANHAM, TAMMY (SIC) GATES, EDWARD

JEFFCOAT, CLINE TAYLOR, JAMES KEISLER, MARY TERRY.

THE COUNTY OF LEXINGTON, *STATE OF SOUTH CAROLINA VERSUS WILLIAM ARTHUR KELLY.*

WE, THE JURY, IN THE ABOVE-ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES, TO WIT:

KIDNAPPING;

BURGLARY;

ROBBERY WITH ARMED AND DEADLY WEAPON;

LARCENY [sic] THE USE OF DEADLY WEAPON;

COMMISSION OF PHYSICAL TORTURE.

NOW RECOMMEND THE COURT THAT THE DEFENDANT, [2087] WILLIAM ARTHUR KELLY, BE SENTENCED TO DEATH.

[2091] **MOTIONS**

* * *

THE COURT: ALL RIGHT.

ANY MOTIONS?

MS. FULLWOOD: YES, SIR. I HAVE TWO MOTIONS.

THE COURT: YES, MA'AM.

MS. FULLWOOD: YOUR HONOR, I WOULD MOVE AT THIS TIME THAT THE COURT SET ASIDE THE JURY'S VERDICT ON GROUNDS THAT IT WAS THE RESULT OF PASSION, PREJUDICE OR SOME OTHER ARBITRARY FACTOR.

IN THAT REGARD, YOUR HONOR, I WOULD POINT OUT THAT THE STATE WAS ABLE TO INTRODUCE OVER THE DEFENDANT'S OBJECTION EVIDENCE THAT THE VICTIM IN THIS CASE WAS PREGNANT. THE STATE WAS, NOT ONLY, PERMITTED TO PUT THAT INFORMATION INTO EVIDENCE, BUT THEY WERE PERMITTED OVER OUR OBJECTIONS TO ARGUE THE SAME TO THE JURY.

FURTHER, YOUR HONOR, THE STATE WAS ALLOWED TO PUT [2092] IN EVIDENCE FACTS WHICH WOULD TEND TO PROVE THAT THE DEFENDANT MIGHT BE DANGEROUS IN THE FUTURE. ON THE OTHER HAND, THE DEFENDANT WAS NOT ALLOWED AN INSTRUCTION TO REBUT THAT INFERENCE; THAT IS, THE INSTRUCTION THAT A LIFE SENTENCE FOR HIM WOULD ACTUALLY MEAN LIFE IN PRISON.

THE SOLICITOR GAVE A VERY IMPASSIONED CLOSING ARGUMENT. DURING THE ARGUMENT, THE VICTIM'S WIDOWER WAS ALLOWED TO SIT AT THE BENCH BEHIND THE SOLICITOR'S TABLE, VERY CLOSE TO THE TABLE, HIS GRIEF AND ANGUISH WAS QUITE APPARENT TO THE JURY AS HE WEPT LOUDLY DURING MR. MYERS' ARGUMENT. AND MR. MYERS MADE AN INFLAMMATORY ARGUMENT

WHICH AT TIMES WAS SUSTAINED BY YOUR HONOR AT OUR OBJECTION.

YOUR HONOR, THIS JURY WENT OUT I BELIEVE, AT 6:37. I THINK THAT'S THE OFFICIAL TIME. I KNOW FROM THE BAILIFFS AND ALL THAT THEIR FIRST ACTIVITY WAS TO GO OUTSIDE FOR A CIGARETTE BREAK, WHICH TOOK THEM SOME TIME, AND THEN THEY CAME BACK – WE GOT THE KNOCK AT THE DOOR AT ABOUT 7:20.

BASICALLY, YOUR HONOR, THEY DELIBERATED FOR ABOUT THIRTY MINUTES BEFORE THEY REACHED THIS SENTENCE.

ON THE OTHER HAND, THEY DELIBERATED FOR ALMOST AN HOUR TO DECIDE THAT HE WAS GUILTY OF ALL THESE CHARGES WHEN WE HAD CONCEDED GUILT. FROM THE OUTSET.

I THINK ALL THESE FACTORS SHOW THAT THIS WASN'T A [2093] REASONABLE DECISION, BUT IT WAS BASED ON PASSION AND PREJUDICE. SO WE THEREFORE ASK THAT YOU SET ASIDE THE VERDICT.

THE COURT: MS. FULLWOOD, I HAVE, OF COURSE, LISTENED VERY CAREFULLY TO ALL THE MOTIONS THAT HAVE BEEN MADE THROUGHOUT THE COURSE OF THE TRIAL AND RULED UPON THEM ACCORDINGLY. AND I HAVE FOUND NOTHING THAT I WOULD CHANGE TO IN ANY WAY INTERFERE WITH THE VERDICT THAT HAS BEEN REACHED BY THE JURY IN THIS CASE.

THE FACT THAT THEY HAVE BEEN HERE FOR THIS PERIOD OF TIME, ALL WEEK, LISTENED VERY CLOSELY TO THE TESTIMONY AND EVIDENCE PRESENTED BY THE STATE AS WELL AS THE DEFENSE LEADS ME TO BELIEVE THAT THEY HAVE BEEN VERY CONSCIENTIOUS IN LISTENING TO THESE MATTERS AND THE FACT THAT THEY HAVE COME TO A VERDICT IN APPROXIMATELY AN HOUR, IN NO WAY DO I FIND THAT THAT'S THE RESULT OF ANY TYPE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR. AND SO GIVEN THE FACT OF MY RULINGS ON YOUR PREVIOUS MOTIONS, I THINK THROUGHOUT THE COURSE OF ANY OBJECTIONS THAT WERE MADE TO THE SOLICITOR'S ARGUMENT, THAT WHEN I SUSTAINED THEM, I TOLD THE JURY THAT THEY WERE TO DISREGARD THOSE AND NOT TO CONSIDER THEM, AND AS A RESULT, ALL MOTIONS ARE DENIED.

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

DEFENDANT'S REQUEST TO CHARGE NUMBER 1

96-GS-32-3226

[Caption Omitted In Printing]

I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

Authority: *S.C. Code Ann.* § 16-3-20 (Cum. Supp. 1997).

IN THE COURT OF GENERAL SESSIONS

DEFENDANT'S PROPOSED REQUESTS TO CHARGE

[Caption Omitted In Printing]

DEFENDANT'S PROPOSED INSTRUCTION NO.: 2

I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may **not** consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during your deliberations as to the sentence to be imposed.

At the same time, you should understand that your consideration of reasons *not* to impose the death penalty is *unlimited*. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that *would* be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Supreme Court of South Carolina.

No. 25226.

[Caption Omitted In Printing]

Heard Sept. 20, 2000.
Decided Jan. 8, 2001.

Assistant Appellate Defender Robert M. Dudek of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

WALLER, Justice.

A jury convicted appellant William Kelly of murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. Kelly was sentenced to death for murder, thirty years consecutive for armed robbery, and five years consecutive for possession of a knife during the commission of a violent crime. This case consolidates his direct appeal with the mandatory review provisions of S.C.Code Ann. § 16-3-25 (1985). We affirm.

FACTS

On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing

time and recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.

Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his *Miranda*[1] rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

Kelly was indicted for murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. At trial, the forensic pathologist who performed the autopsy testified that Shealy was stabbed thirty-one times and her neck was cut from ear to ear. She bled to death. At the time of her death, Shealy was 23 weeks pregnant. The jury convicted Kelly on all charges.

In the sentencing phase, the trial court instructed the jury on five statutory aggravating circumstances, to wit,

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that the murder was committed while in the commission of: (1) kidnapping; (2) burglary; (3) robbery while armed with a deadly weapon; (4) larceny with use of a deadly weapon; and (5) physical torture. *See* S.C.Code Ann. § 16-3-20(C) (Supp.1999). The jury was charged on three statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the age of the defendant at the time of the crime; and (3) the defendant was below the age of eighteen at the time of the crime. *Id.* The jury found all five aggravating circumstances and recommended the death penalty. Accordingly, the trial court imposed a sentence of death for the murder conviction.

ISSUES

1. Did the trial court err by refusing to redact from Kelly's statement references to Shealy's pregnancy?

2. Did the trial court err by refusing to charge the jury on parole ineligibility?

3. Did the trial court err by refusing to charge the jury that future dangerousness was not at issue?

4. Was the testimony of Matthew McCormack improperly bolstered by the State?

5. Did the trial court err by allowing testimony from Shealy's sister about statements made by Shealy's son?

1. FAILURE TO REDACT REFERENCES TO VICTIM'S PREGNANCY

Kelly raises only one issue regarding the guilt phase of his trial. He argues that the trial court erred by not redacting from his confession references to Shealy's pregnancy. We disagree.

Kelly gave the Lowell police a written statement which the State introduced at trial. In his statement, Kelly confessed to slitting Shealy's throat and stabbing her repeatedly. Basically, Kelly's explanation for why he killed Shealy was that his attack was in response to Shealy's request for sex. He stated that while he worked at the KFC, Shealy would "always" proposition him sexually. Kelly stated that on January 5, 1996, he went to the KFC after closing time and saw Shealy in the office. According to Kelly, Shealy again propositioned him for sex, grabbed him, and asked him not to leave. He stated that he duct-taped Shealy's hands behind her back so she would not touch him. Kelly said that as he went to leave, Shealy got her hands free, grabbed him and started hitting him. Kelly stated that he then took out his knife, slit her throat and continued to stab her while she kept grabbing at him. Kelly told the Lowell police that Shealy then fell to the floor and was gasping for air. To keep her from getting up, Kelly said that he again taped her hands behind her back.

Kelly made two references to Shealy's pregnancy in his statement. First, he stated that he "did know that Shirley was pregnant." Second, Kelly stated that Shealy asked him "to stay and have sex with her" and that she

told him "since she was pregnant already" he could not get her pregnant if they had sex.

At the outset of the guilt phase, Kelly moved to exclude any evidence that Shealy was pregnant. The State informed the trial court that it planned on introducing Kelly's statement which, as detailed above, included references to the pregnancy. Kelly then moved to redact those references. The trial court denied the motion. With the exception of Kelly's statement, the State did not introduce any evidence about Shealy's pregnancy during the guilt phase of the trial. Kelly presented no witnesses in his defense. At Kelly's request, the jury was instructed on voluntary manslaughter.

In the State's guilt phase closing argument, Shealy's pregnancy was mentioned twice without objection. The State argued that Kelly had "the perfect victim. He's got a pregnant lady. Is she going' to do what he says? Yes, ma'am. Yes, sir." The State noted the pathologist's testimony that there were no defensive wounds and no blood on Shealy's hands. The State therefore argued that Kelly's statement that Shealy's hands were free during the attack was not credible. Specifically, the State argued that if her hands were free, "What is she going to do? She's going to be covering up. She's going to be trying to avoid it. She's pregnant."

Kelly contends that the trial court should have redacted his statement to remove the references to Shealy's pregnancy because the evidence was not relevant, or, alternatively, the probative value of this evidence was outweighed by its unfairly prejudicial impact. We disagree.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Nevertheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (citation omitted). The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. *Id.* at 380, 401 S.E.2d at 148.

The jury was instructed on both murder and voluntary manslaughter.[2] Thus, there was an issue on the presence or absence of malice. *See State v. Gandy*, 283 S.C. 571, 573, 324 S.E.2d 65, 66-67 (1984) (voluntary manslaughter is distinguished from murder because "the vital element of malice is missing") *implicitly overruled on other grounds by Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C.Code Ann. §§ 16-3-10, 16-3-50 (1985 & Supp.1999). " 'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing

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[2] Murder is "the killing of any person with malice aforethought, either express or implied." S.C.Code Ann. § 16-3-10 (1985). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *E.g., State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998); *see also* S.C.Code Ann. § 16-3-50 (1985) (manslaughter is "the unlawful killing of another without malice").

wrong." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

We believe the evidence of Shealy's pregnancy was relevant to the issue of intent, i.e., whether Kelly acted with malice. The State's theory of the case was that Kelly planned his crimes.[3] Because Kelly knew Shealy was pregnant, and thus, particularly vulnerable, the jury could infer that Kelly had consciously selected a "perfect victim." Such evidence of planning certainly negates voluntary manslaughter which requires a showing of provocation. Additionally, although the evidence of Shealy's pregnancy came directly from Kelly's own statement, this evidence tended to refute Kelly's version of how the attack occurred. Therefore, Kelly's references to the pregnancy made it less probable that he committed voluntary manslaughter. *See* Rule 401, SCRE. Moreover, the fact that Kelly killed a pregnant woman, in our opinion, "indicates a wicked or depraved spirit intent on doing wrong." *State v. Kelsey, supra*. The evidence was, therefore, probative on the issue of whether Kelly acted with malice.

Kelly argues that this evidence undeniably had an emotional impact on the jury, and thus should have been excluded because it was unfairly prejudicial. As discussed above, the evidence was relevant to the only real issue in the guilt phase-the presence or absence of malice. Accordingly, we believe the probative value of the evidence outweighed its prejudicial effect. *Compare State v.*

[3] For example, the State established that the type of latex gloves and duct tape used in the attack were not used by the KFC and that they were used at the McDonald's where, at the time of his crimes, Kelly was working as a cook.

Garner, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is *not* a contested issue) *with State v. Simmons*, 310 S.C. 439, 427 S.E.2d 175 (1993) (probative value of other-crimes evidence outweighed its prejudicial effect where the issue of intent was a contested one), *reversed on other grounds by Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[4]

We hold that the trial court did not abuse its discretion in admitting evidence of Shealy's pregnancy in the guilt phase. *State v. Alexander, supra.* Accordingly, Kelly's convictions are affirmed.

2. REFUSAL TO GIVE PAROLE INELIGIBILITY INSTRUCTION

Kelly argues that the trial court erred in the sentencing phase when it refused to instruct the jury that he would be ineligible for parole if sentenced to life. Kelly contends that since the State presented evidence of Kelly's future dangerousness, due process and *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the parole ineligibility charge. We

[4] Additionally, we note that the manner in which the evidence was introduced minimized its prejudicial effect. The State did not elicit testimony about Shealy's pregnancy from any witness in the guilt phase. The only evidence admitted on the fact came in through Kelly's statement. Likewise, in the State's guilt phase closing argument, Shealy's pregnancy was mentioned only twice.

hold that *Simmons* does not apply to this case, and therefore, the trial court correctly declined to give the instruction.

In the sentencing phase, the State presented several witnesses who testified about Kelly's actions while he was incarcerated at the Lexington County Detention Center. The jail administrator testified that an attempted escape charge had been filed against Kelly because a mortar joint around a cinder block in his cell had been gouged out.[5] Matthew McCormack, who had twice been Kelly's cellmate at the jail, testified that he and Kelly often spoke of escaping and that Kelly had, at one point, taken action on an escape plan. McCormack stated that Kelly made a shank and planned to take a female correctional officer hostage. Although Kelly called the correctional officer to their cell, McCormack stated that Kelly backed out of going through with the plan. The State also questioned correctional officer Mark Wharton who testified that he discovered a shank in Kelly's possession. Finally, Edward Bryant, who had been in jail with Kelly, testified that he heard Kelly talk about escape. In addition, Bryant testified that Kelly bragged about his crime, requested that he be called "KFC," and walked around with a cup which had a drawing of a chicken with its head cut off and a knife on it.

At the conclusion of the sentencing phase, Kelly requested the following jury charge:

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[5] On cross-examination, Kelly emphasized he was only one of three inmates housed in that cell and it had not been proven he was the one who actually had dug out the mortar around the cinder block.

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

See S.C.Code Ann. § 16-3-20 (Supp.1999). The State objected to the charge and stated that because it was not going to argue future dangerousness, the charge was not required by *Simmons*. Ruling that the State's evidence went to Kelly's character and characteristics and not to future dangerousness, the trial court denied the request to charge.[6]

In closing argument, the State argued that the death penalty was "the punishment that fits the crime." The State argued that Kelly had planned his crime and that he was a "master murderer." Because Kelly had no prior record, the State argued that a person who commits "an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. . . . You kind of trust them a little bit." Further, the State argued that Kelly was intelligent, quick-witted and did not have any mental illness. Thus, the State argued that made Kelly "a little more dangerous . . . for this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy." Finally, the State recounted, over objection, the evidence regarding Kelly's

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[6] The jury was given a plain meaning charge.

attempted escapes from jail and that he had a shank. The State then argued that "murderers will be murderers. And he is the cold-blooded one right over there."

On appeal, Kelly contends that: (1) the State's evidence about escape attempts, possession of a shank, and his behavior in jail raised the issue of future dangerousness; (2) the State argued future dangerousness in its closing; and therefore, (3) the trial court erred in refusing to charge the jury regarding Kelly's parole ineligibility. Kelly argues he was denied due process because the jury instruction was mandated by *Simmons*.

In *Simmons*, a plurality of the United States Supreme Court held that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposing the death penalty, the defendant is entitled to have the jury informed of his parole ineligibility through either defense argument or instruction by the trial judge. *Simmons, supra.*[7] The *Simmons* Court explained that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' " *Id.* at 161, 114 S.Ct. at 2192, 129 L.Ed.2d at 141 (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d

[7] Shortly after *Simmons* was decided, this Court held that the trial judge *must* charge a capital defendant's parole ineligibility when future dangerousness is at issue and either the defendant requests such a charge or the jury inquires about the meaning of "life imprisonment." *State v. Southerland*, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

393, 404 (1977)). Thus, the Court ruled that the "State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171, 114 S.Ct. at 2198, 129 L.Ed.2d at 147.

To be entitled to a *Simmons* charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. *Id.* at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *see also State v. McWee*, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996), *cert. denied*, 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 618 (1997) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the *Simmons* test.

First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by *Simmons*.[8] The underlying principle of the *Simmons* holding is that if evidence of future dangerousness is presented by the

[8] When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public *if released* from prison." *Simmons*, 512 U.S. at 163, 114 S.Ct. at 2193, 129 L.Ed.2d at 142 (emphasis added).

State, the defendant must be allowed to *rebut* this evidence by showing that he will never be eligible for parole, i.e., that he will never *legally* be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be instructed on parole ineligibility. The flaw in Kelly's argument is that a *Simmons* charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross-examination of the State's witnesses and the witnesses presented in his defense.[9] Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly

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[9] Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

argues that the State's argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. *Cf. Simmons, supra* (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder and because of the status of Shealy, the pregnant victim.

We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

Additionally, the second prong of the *Simmons* test was not met. The *Simmons* rule is applicable when the only alternative to a death sentence is life imprisonment without parole. *See Simmons*, 512 U.S. at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *State v. McWee*, 322 S.C. at 391-92, 472 S.E.2d at 238. Because Kelly was tried under the new sentencing scheme which became effective on January 1, 1996, he could have been sentenced to either (1) death; (2) life without the possibility of parole; or (3) a mandatory minimum thirty year

sentence. *See* S.C.Code Ann. § 16-3-20 (Supp.1999). The mandatory minimum sentence of thirty years is available only if the jury returns with no finding of aggravating circumstances. *Id.*

This Court recently held that *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000); *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *cert. granted*, ___ U.S. ___, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000). The logic behind this holding is that a *Simmons* charge is designed to answer the State's evidence that the defendant will be a future danger to society by telling the jury that if sentenced to life in prison, the defendant will never be paroled. In other words, a *Simmons* charge informs the jury that by rejecting the death penalty, the defendant will spend the rest of his natural life in prison. However, if another sentence other than life without parole is available to the defendant as an alternative to the death penalty, then a *Simmons* charge would actually mislead the jury by representing that the defendant would never be released from prison, when in fact, a thirty-year sentence is a potential sentence for the defendant. *See Starnes*, 340 S.C. at 329, 531 S.E.2d at 916 ("Contrary to a sentence of life imprisonment without parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society."). Accordingly, *Simmons* should not, and does not, apply when *as a*

matter of law another sentence other than death or life without parole is available to a capital defendant.[10]

Nonetheless, Kelly contends that the thirty-year minimum sentence was not available to him because the jury would have violated its oath if it had not found at least one aggravating circumstance. Thus, Kelly argues that *Simmons* applies to the instant case. In *Starnes*, however, we stated that it is "inappropriate to assume the jury will find a statutory aggravating circumstance." *Id.* at 330, 531 S.E.2d at 917. Although we granted Kelly's motion to argue against the recent precedent set in *Starnes* and *Shafer*, we adhere to that precedent and hold it is not appropriate to presume that in certain cases a jury will always find particular statutory aggravating circumstances. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (where this Court found error in submitting to resentencing jury convictions from previous trial as evidence of aggravating circumstances; the Court stated that the convictions from the guilt phase were not "binding upon the resentencing jury" as it was the sentencing "jury's responsibility to find the existence, *or not*, of a

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[10] We note that the second prong of the *Simmons* test may be satisfied under certain circumstances. For example, if the recidivist statute is applied, there will be no third alternative sentence as a matter of law. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (imposing mandatory sentence of life imprisonment without parole where defendant has prior convictions of a most serious nature). If section 17-25-45 is invoked and future dangerousness is argued, *Simmons* is applicable because the only available sentences are life without parole or death. In the instant case, however, Kelly had no previous convictions, and therefore, section 17-25-45 does not affect our analysis of this issue.

statutory aggravating circumstance") (emphasis added). Therefore, Kelly cannot satisfy the second prong of the *Simmons* test.

We hold the trial court correctly refused to give the jury a *Simmons* charge.[11]

3. REFUSAL TO CHARGE THAT FUTURE DANGEROUSNESS WAS NOT AT ISSUE

After his request on the parole ineligibility charge was denied, Kelly requested the following jury charge:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during you deliberations as to the sentence to be imposed.
>
> At the same time, you should understand that your consideration of reasons not to impose the death penalty is unlimited. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that would be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Because the State agreed not to argue future dangerousness, Kelly maintains that the trial court erred in failing to give the charge. We disagree.

"The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The law to be charged to the jury is determined by the evidence presented at trial. *E.g., State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989). Furthermore, a trial court should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. *Id.; see also*

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[11] Kelly also contends that the requested instruction was required because of James Aiken's testimony regarding good time credits. Aiken, Kelly's expert witness on prison management, testified on direct examination that prisoners may be sanctioned for disciplinary infractions by "taking good time away." On cross-examination, the State questioned Aiken further, and Aiken stated that he was speaking hypothetically, not about this particular case. Kelly argues that the testimony about good time credits raised the inference that he would be released from prison, and therefore, he should have been able to rebut the evidence with the parole ineligibility charge. We believe Kelly's contention is without merit. Aiken's testimony merely discussed, in general terms, internal prison procedures for dealing with disciplinary violations committed by inmates. Kelly was not denied the opportunity to rebut this evidence; therefore, his due process rights were not compromised. Moreover, we note his own counsel elicited this testimony on direct examination. *State v. Washington*, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (appellant may not complain about the admission of evidence elicited by his own counsel).

State v. Leonard, supra (a trial court commits error when it provides instructions which are calculated to confuse or mislead the jury).

We hold that the trial court correctly denied the requested charge because the evidence did not support the charge as written. The State is permitted to argue that a capital defendant might pose a future danger to those within prison. This type of evidence and argument is distinguishable from what is considered "future dangerousness" under *Simmons*, i.e., a future danger to society. *Cf. State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (where the Court indicated that if prosecution had argued only that defendant posed a danger to other prison inmates, and had not included danger to society argument, then *Simmons* would not apply); *Allridge v. Scott*, 41 F.3d 213 (5th Cir.1994), *cert. denied*, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (where the court noted that *Simmons* is inapplicable where the State argues that the defendant poses a danger to everybody, including fellow inmates) (citing *Simmons*, 512 U.S. at 165 n. 5, 114 S.Ct. at 2194 n. 5). Therefore, the requested charge was clearly incorrect because it instructed the jury "there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment." This charge thus would have precluded the jury from considering evidence of Kelly's future danger to others within prison, evidence which was clearly presented by the State and appropriate for the jury to consider.

Moreover, the charge as written is extremely confusing. It simply would not have aided the jury in making its sentencing determination. *State v. Leonard, supra.*

Accordingly, the trial court did not err by denying this request to charge.

4. BOLSTERING OF STATE'S WITNESS

Kelly argues that the State improperly bolstered Matthew McCormack's testimony thereby impermissibly vouching for McCormack's credibility. We agree.

As recounted above in Issue 2, McCormack had been Kelly's cellmate. McCormack testified about Kelly making a shank and how he said he was going to use it to abduct a female correctional officer. In addition, McCormack testified that Kelly had frequently spoken about his crimes. McCormack stated that Kelly told him that he and Shealy had planned to rob the KFC but that Shealy had turned on him during the robbery. McCormack testified that Kelly told him that he came up behind Shealy and cut her throat and had tried to decapitate her.

Toward the end of McCormack's direct examination, the following colloquy took place:

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [McCormack]: Uh – excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury –
>
> [McCormack]: Of course.

At that point, Kelly objected on the grounds that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. After the trial court overruled the objection, the assistant solicitor continued:

> [Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?
>
> [McCormack]: The truth.

On cross-examination, Kelly questioned McCormack about his prior criminal record which included grand larceny, burglary and forgery convictions. Kelly also elicited testimony from McCormack, who was a federal inmate, regarding how in the federal system an inmate could get a sentence reduction if he provides helpful testimony to the government. McCormack acknowledged that the potential for a sentence reduction was "one of [his] main reasons for" testifying against Kelly.

Kelly argues that the State's questioning impermissibly bolstered McCormack's credibility because it placed the prestige of the government behind McCormack, a jailhouse informant. Kelly also maintains that the assistant solicitor effectively became a witness in the case and vouched for McCormack's credibility.

In *United States v. Walker*, 155 F.3d 180 (3d Cir.1998), the Court of Appeals for the Third Circuit discussed generally the concept of vouching:

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 184 (citations omitted).

Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument. *See id.* at 185-87 (discussion of Third Circuit case law on vouching). In the instant case, however, Kelly's argument is targeted at the State's questioning of McCormack. At least one court has held that this type of questioning is improper. *See Mitchell v. State*, 549 P.2d 96 (Okla.App.1976) (where the prosecutor asked witness whether they had "talked about this case" and witness responded "Yes, sir. You instructed me to tell the truth," the court found improper bolstering).

In our opinion, the State's questions served to improperly bolster McCormack's credibility. *Id.* Although perhaps not technically vouching, the manner of questioning[12] by the State raises the second concern outlined

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[12] Although the assistant solicitor did not comment that he had personal knowledge McCormack was telling the truth or had outside evidence indicating the truthfulness of McCormack's testimony, the assistant solicitor improperly phrased his questions in the first person. ("What did *I* tell you *that I absolutely required* regarding your testimony to this jury today?" and "Did *I* tell you to tell the truth to this jury?") (emphasis added).

by the *Walker* court: the jury could have perceived that the assistant solicitor held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility. Accordingly, the trial court erred in overruling Kelly's objection.

Nevertheless, we believe that this error was harmless beyond a reasonable doubt. *See State v. Gaskins*, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), *overruled in part on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In our opinion, Kelly's cross-examination effectively impeached McCormack's credibility by eliciting information about his motive for testifying. Moreover, given the overwhelming evidence of aggravation in this case, we do not believe that the State's bolstering of McCormack materially influenced the jury's decision to impose the death penalty.

Accordingly, because the error was harmless, Kelly is not entitled to resentencing on this issue.

5. TESTIMONY FROM VICTIM'S SISTER

Kelly argues that the trial court erroneously admitted hearsay testimony from Shealy's sister Cynthia Slade. We disagree.

During the sentencing phase, the State called Slade who presented victim impact testimony. The State questioned Slade about Shealy's son Alex, who was six years old when Shealy was killed:

> [Solicitor]: Have you seen Alex since his mother was murdered?
>
> [Slade]: Yes, sir.
>
> [Solicitor]: Has there been a change in him?
>
> [Slade]: Oh, yeah.
>
> [Solicitor]: Does he talk about it?
>
> [Slade]: Yeah. He talks about it a lot [sic]. We were at a wedding and he told basically everybody –

Kelly's attorney objected on the basis of hearsay. The trial court overruled the objection. When the State asked what Alex had said, Slade responded:

> He told everybody in the – at the wedding that a bad man had killed his mommy.

Kelly argues Slade's testimony that Alex said "a bad man had killed his mommy" was impermissible hearsay and should have been excluded.

The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted." Rule 801(c), SCRE. By that definition, we believe Slade's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. That is, the evidence was not introduced to prove that a bad man killed Shealy. Instead, the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family. As such, it was properly offered as victim impact evidence. *See, e.g., State v. Byram,* 326 S.C. 107, 485 S.E.2d 360 (1997) (victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness).

Accordingly, the trial court correctly allowed this evidence to be admitted.

Kelly's remaining issue[13] is affirmed pursuant to Rule 220(b)(2) and the following authorities: *State v. Johnson,* 338 S.C. 114, 525 S.E.2d 519, *cert. denied,* ___ U.S. ___, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000) (autopsy photograph may be relevant to showing physical torture); *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998) (the determination of the relevancy, materiality, and admissibility of a photograph is left to the sound discretion of the trial judge); *State v. Kornahrens,* 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied,* 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781

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[13] Kelly argues that the trial court erred in admitting two of the State's photographic exhibits. As to Exhibit 116, an autopsy photograph, we note Kelly maintains that the exhibit "shows the fetus in the decedent's stomach." On the contrary, it is clear from both the photograph and the testimony at trial that this exhibit depicts Shealy's gaping neck wound.

(1987) (photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them are admissible in sentencing phase of capital trial).

CONCLUSION

Kelly's convictions and sentences are affirmed. We have conducted the proportionality review required by S.C.Code Ann. § 16-3-25(C) (1985). The death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Hicks,* 330 S.C. 207, 499 S.E.2d 209, *cert. denied,* 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998); *State v. Powers,* 331 S.C. 37, 501 S.E.2d 116, *cert. denied,* 525 U.S. 1043, 119 S.Ct. 597, 142 L.Ed.2d 539 (1998).

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur.

PLEICONES, J., dissenting and concurring in part in a separate opinion.

PLEICONES, Justice, dissenting and concurring.

I concur in the majority opinion with the exception of that portion which affirms the trial judge's refusal to give the requested parole ineligibility instruction. I would, therefore, affirm the convictions of the appellant, and reverse and remand for a new sentencing proceeding. It is my view that a *per se* rule should be adopted, requiring that, when requested, a parole ineligibility instruction be given to the jury deciding sentencing in a capital case.

In this case, appellant requested the following charge at the end of the sentencing phase:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

The majority affirms the trial judge's denial of this legally correct charge which is taken virtually verbatim from S.C.Code Ann. § 16-3-20(A) (Supp.1999). The majority relies upon our decisions in *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000), and *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000),[1] which hold that most capital defendants in South Carolina are no longer entitled to a parole ineligibility charge under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). Under *State v. Starnes, supra*, and *State v. Shafer, supra*, *Simmons* did not apply because appellant would not necessarily have received a sentence of life imprisonment had the jury failed to find a statutory aggravating circumstance.[2] Appellant, as the majority points out, could have

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[1] Appellant was granted permission to argue against these precedents. The United States Supreme Court has granted certiorari in *Shafer, supra*, ___ U.S. ___, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000).

[2] Appellant had no previous convictions of either "serious" or "most serious" offenses. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (defining these offenses).

received a mandatory minimum sentence of at least thirty years without the possibility of parole.

Further, the majority adheres to this Court's recent ruling in *State v. Starnes, supra*, that it is inappropriate to presume that juries will always find the existence of aggravating circumstance.

I propose a rule that is not dependent upon the shifting grounds of constitutional interpretation, is simple to apply, and has the result of fully informing the jury of its options. We have taken great pains to advise the jury that it is the final sentencing authority in a capital case.[3] That being the case, the jury should be equipped with the same knowledge in terms of sentencing as a sentencing judge. In my opinion, we should take this opportunity to clarify and simplify the rule for charging capital juries on the defendant's ineligibility for parole or early release.

Under our current capital sentencing scheme, if the defendant has been previously convicted of a "serious" or "most serious" offense[4] he faces only two possible sentences: death, or life imprisonment without possibility of parole. S.C.Code Ann. § 17-25-45 (Supp.1999).

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[3] A trial judge must, of course, still make an affirmative finding that the death penalty was warranted under the evidence, and that it was not the result of passion, prejudice, caprice, or any other arbitrary factor. S.C.Code Ann. § 16-3-20(C)(b) (Supp.1999).

[4] S.C.Code Ann. § 17-25-45(C)(1) and (2) (Supp.1999).

If the defendant has not been previously convicted of a "serious" or "most serious" offense, the potential sentences depend upon the jury's finding of at least one statutory aggravating circumstance. If the jury finds a statutory aggravating circumstance, the only sentencing choice to be made is whether to impose the death penalty or life imprisonment without possibility of parole. Should the jury fail to find the existence of a statutory aggravating circumstance, the sentence rests in the discretion of the trial judge. Her choices are life imprisonment, or a mandatory minimum term of at least thirty years. The defendant is parole ineligible in either circumstance.[5]

In my opinion, the unique circumstances of a capital case require that the sentencing authority – whether judge or jury – be fully informed with regard to sentencing options, including the convicted offender's parole ineligibility.

I would hold that where requested by the defense, a properly phrased parole ineligibility charge must be given to the jury in a capital case.

The jury would be instructed that should they find the existence, beyond a reasonable doubt, of one of more aggravating circumstances, there would be but two potential punishments: life imprisonment or the death penalty. The jury would further be informed that life imprisonment means until death, and that the defendant would be ineligible for parole or other early release. This is the charge requested by appellant here.

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[5] § 16-3-20(A) and (C)(b) (Supp.1999).

The jury would also be informed that should it fail to find the existence, beyond a reasonable doubt, of at least one statutory aggravating circumstance, the punishment would be solely within the province of the trial judge. The jury would be told that the sentencing options would be limited to life imprisonment without the possibility of parole, or, assuming the defendant were a non-recidivist, a mandatory minimum of at least thirty years, also without the possibility of parole.

I agree with Justice Blackmun's plurality opinion in *Simmons v. South Carolina, supra,* wherein he discussed the perceptions of most jurors regarding parole:

> It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States . . . . An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'. *Id.* at 169-70, 114 S.Ct. at 2197, 129 L.Ed.2d at 146. The *Simmons* plurality noted that, at the time it was decided, twenty-six states empowered juries in capital sentencing and provided for life imprisonment without parole as an alternative punishment. Of those states, seventeen required that the jury be expressly informed of the defendant's parole ineligibility. *See id.* at n. 7. The Commonwealth of Virginia recently joined that number with its Supreme Court's decision in *Yarbrough v. Commonwealth,* 258 Va. 347, 519 S.E.2d 602 (1999). In my opinion, this State should likewise adopt the practice.

In its search for an appropriate sentence, the jury should have the benefit of clear and accurate instructions regarding its options. A "plain meaning" instruction does not adequately inform the jury. Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose a sentence of death based upon "fear rather than reason." *Yarbrough v. Commonwealth, supra, citing Farris v. Commonwealth,* 209 Va. 305, 307, 163 S.E.2d 575, 576 (1968). A parole ineligibility charge would eliminate any speculation. Since such a charge was not given in this case despite appellant's request, I would reverse the sentence and remand for a new sentencing proceeding.

The Supreme Court of South Carolina

[Caption Omitted In Printing]

ORDER

This Court affirmed petitioner's conviction and death sentence on direct appeal. *State v. Kelly,* Op. No. 25226 (S.C. Sup. Ct. filed January 8, 2001) (Shearouse Adv. Sh. No. 1 at 13). Petitioner now asks this Court to stay his execution while he seeks a writ of certiorari from the United States Supreme Court.

Petitioner's request for a stay of execution is granted. This stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases,* 321 S.C. 544, 471 S.E.2d 140 (1996).

IT IS SO ORDERED.

/s/ [Illegible] C.J.

/s/ [Illegible] J.

/s/ [Illegible] J.

/s/ [Illegible] J.

/s/ [Illegible] J.

Columbia, South Carolina

February 7, 2001

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 25, 2001

Mr. David I. Bruck
P.O. Box 11744
Columbia, SC 29211

Re: William Arthur Kelly
v. South Carolina
No. 00-9280

Dear Mr. Bruck:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk